IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-493

JOHN W. VLANDIS, Director of Admissions, The University of Connecticut, *Appellant*,

v.

MARGARET MARSH KLINE and PATRICIA CATAPANO, *Appellees*

Appeal From The United States District Court for The District of Connecticut

APPENDIX

FILED SEPTEMBER 22, 1972
PROBABLE JURISDICTION NOTED DECEMBER 4, 1972

INDEX

RELEVANT DOCKET ENTRIES

1971	
October 20	Verified Complaint . . . Motion for Permission to Proceed in Forma Pauperis, Affidavit, Order granting Permission to Proceed in Forma Pauperis . . . Motion for Preliminary Injunction and Application for Convening of a Three-Judge District Court. . . .
November 8	Hearing . . . Injunction will be ruled upon by the Three-Judge Court.
December 2	Answer to Complaint, filed.
December 10	Motion of Patricia Catapano to Intervene as a Plaintiff, Notice of Motion, and Motion for Permission to Proceed in Forma Pauperis and Affidavit, filed.
December 27	Hearing on (1) Plaintiff's (Re-Notice) Motion for Preliminary Injunction. . . . (2) Motion of Patricia Catapano to Intervene as a Plaintiff. "Granted".
1972	
January 4	Ruling on Application for a Preliminary Injunction, entered . . . denied.
January 6	Answer to Complaint of Intervener, Patricia Catapano filed by defendant.
January 7	Hearing on the Merits. Patricia Catapano's Motion to Intervene granted. Motion to Dismiss — Decision Reserved.

June 14 — Memorandum of Decision, Findings of Fact and Conclusions of Law, filed and entered. Court holds . . . "that Conn. Gen. Stats. Sec. 10-329(b), as amended by Public Act No. 5, Sec. 126 (1971), and the regulations promulgated thereunder by the defendant are unconstitutional in that they violate section 1 of the fourteenth amendment to the Constitution of the United States; . . . that before the commencement of the Spring semester for 1972 each of the plaintiffs was a bona fide resident of the State of Connecticut and . . . that each of them is entitled to a refund of the amounts of tuition and fees paid by her which is in excess of the amount paid by resident students as tuition and fees for that semester. The defendant is enjoined from enforcing subsections (a)(2), (a)(3) and (a)(5) of Conn. Gen. Stats. Sec. 10-329(b), as amended by Public Act No. 5, Sec. 126 (1971), and any regulations based thereon."

June 29 — Notice of Appeal to U.S. Supreme Court, filed by defendant.

July 13 — Motion for Stay Upon Appeal, filed by defendant.

July 17 — Plaintiffs' Opposition to Defendant's Motion for Stay Pending Appeal, filed.

July 17 — Order endorsed on Defendant's Motion for Stay Upon Appeal, as follows: "The burden would be greater on the students and plaintiffs than on the def. Motion denied. July 15, 1972".

VERIFIED COMPLAINT OF PLAINTIFF MARGARET MARSH KLINE

I.

JURISDICTION

1. This is an action for legal and equitable relief pursuant to § 1983 of Title 42 of the United States Code. The Plaintiff seeks an order enjoining the Defendants from violating her constitutional and legal rights through the Defendants' conduct and actions hereinafter described. Relief is sought on the basis that the Defendants' conduct and actions violate the Plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States of America.

2. Original jurisdiction over this suit is conferred upon this Court under the provisions of § 1343 of Title 28 of the United States Code as such provisions relate to actions arising under § 1983 of Title 42 of the United States Code.

II.

PARTIES

A. PLAINTIFF

1. MARGARET MARSH KLINE is 22 years old, a citizen of the United States of America and a resident of the Town of Mansfield in the State of Connecticut.

B. DEFENDANT

1. The defendant, JOHN W. VLANDIS, Director of Admissions of the University of Connecticut, sued in his individual and official capacity, is charged with the duty of determining a students' in-state or out-of-state status. He is a citizen of the United States and of the State of Connecticut.

III.

CLAIM FOR RELIEF

1. In May of 1971, the plaintiff, Margaret Marsh Kline, while residing in California, became engaged to Peter Kline, a life-long Connecticut resident.

2. In May of 1971, the plaintiff while a student at California State College at Haywood applied to the University of Connecticut at Storrs for admission as an undergraduate and was accepted in late May, 1971.

3. On June 26, 1971, the plaintiff and Peter Kline intermarried in California and soon after took up residence in Storrs, Connecticut, where they have established a permanent home.

4. On or about September 2, 1971, the plaintiff received a letter, together with a copy of "Regulations Regarding Residence" and a Residence Affidavit, (appended as plaintiff's Exhibits A, B, and C), from the defendant, John W. Vlandis, Director of Admissions of the University of Connecticut. The letter informed her that she was being classified as an out-of-state student.

5. That same day the plaintiff protested this classification by letter to the University of Connecticut Business Office, a copy of which is appended as plaintiff's Exhibit D.

6. On September 14, 1971, the plaintiff registered as a full-time student at the University. On September 3, 1971 she was required to pay $150.00 as out-of-state tuition for the first semester, as compared with no tuition being paid by an in-state student. Upon registration for the second semester she will be required to pay $425.00 tuition per semester while an in-state student will pay $175.00.

7. In classifying the plaintiff as an out-of-state student the defendant has acted under color of § 10-329(b) of the Connecticut General Statutes (as amended by Public Act, No. 5, § 126 (June Session, 1971) a copy of which is appended as plaintiff's Exhibit E.

8. Section 10-329(b) sets up two classes of residents by which the plaintiff has been irreversibly and arbitrarily classified as an out-of-state student thereby depriving her of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

9. By reason of this irreversible classification, the plaintiff is being penalized for exercising her fundamental constitutional right to travel freely from one state to another.

10. An irreversible classification based on the plaintiff's residence at the time of her application to the University of Connecticut is arbitrary, capricious and unreasonable.

11. Accordingly, the plaintiff has suffered, is suffering and will continue to suffer immediate and irreparable injury for which there is no adequate remedy at law.

IV.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays the Court to:

1. Declare that Section 10-329(b) of the General Statutes of the State of Connecticut is, on its face or as applied to the Plaintiff, invalid and unenforceable under the Constitution of the United States of America.

2. Preliminary enjoin the Defendant from acting under the provisions of Section 10-329(b).

3. Permanently enjoin the Defendant from acting under the provisions of Section 10-329(b).

4. Grant damages to the Plaintiff in an amount to compensate for any loss incurred because of action taken under Section 10-329(b).

5. Grant such other relief as the Court may deem appropriate.

PLAINTIFF'S EXHIBIT 'A'

THE UNIVERSITY OF CONNECTICUT
STORRS, CONNECTICUT 06208
DIVISION OF STUDENT PERSONNEL
ADMISSIONS OFFICE

Mrs. Margaret Kline
Flaherty Road
Storrs, Conn. 06268

Dear Mrs. Kline:

I am enclosing a copy of the new residence regulations as recently established by the General Assembly of Connecticut. It becomes quite obvious that you fall in the category of an out-of-state student.

We are, therefore, notifying the Business Office that you are to be treated as an out-of-state student.

Very truly yours,

L/S
JOHN W. VLANDIS
Director of Admissions

JWV:ch

PLAINTIFF'S EXHIBIT 'B'

TO ALL NEW STUDENTS:

The 1971 Connecticut General Assembly passed legislation which established new resident and non-resident tuition charges and definitions for determining status as 'out-of-state student' in the State system of higher education.

These 'Regulations Regarding Residence' and the tuition schedule with dates effective are given below.

*Regulations Regarding Residence**

a. Each student must file with his application for admission to the University of Connecticut an affidavit of residence, on forms prescribed by the University. On the basis of this information, each entering student will be classified as a Connecticut or an out-of-state student.

b. The following definitions have been established by the Connecticut General Assembly:

'Out-of-state student', if single, means a student whose legal address for any part of the one year period immediately prior to his application for admission at a constituent unit of the State system of higher education was outside Connecticut.

'Out-of-state student', if married and living with his spouse, means a student whose legal address at the time of his application for admission to such a unit was outside of Connecticut.

The status of a student as established at the time of his application for admission at a constituent unit of the State system of higher education under the provisions of this section shall be his status for the entire period of his attendance at such constituent unit.

c. Except as stated in paragraph (b) above, the residence of a student shall follow that of the parents or legally appointed guardian. The residence of the father, if living, otherwise the residence of the mother, is the residence of a student but if the father and the mother have separate places of residence, the student takes the residence of the parent with whom he lives or to whom he has been assigned by court order.

d. The failure of a student to disclose fully and accurately all facts relating to his residence status shall be grounds for suspension or expulsion.

*These regulations are subject to subsequent revision by the Connecticut General Assembly.

Tuition per semester (in addition to resident and non-resident University *fees):*

	Fall semester 1971-72	Spring semester 1972 and thereafter
In-State student	None	$175
Out-of-state student	$150	$425

PLAINTIFF'S EXHIBIT 'C'

Margaret Kline
Flaherty Rd.
Storrs, Ct.

RESIDENCE AFFIDAVIT

Please read carefully the "Regulations Regarding Residence" and complete the section below that applies to you. You must complete and return this affidavit in order to qualify as an in-state student even though you may have already submitted a residence affidavit. Earlier forms are superseded by the new regulations.

I. Complete both statements:

I, _____, am single and certify that I am a legal resident of the State of Connecticut. I have not had a legal address outside of Connecticut for any part of the one year period prior to my application for admission to the University.

Signature: _____

I, _____, certify that I am the legal parent ( ) Guardian* ( ) of _____ _____ and a legal resident of the State of Connecticut. I have not had a legal address outside of Connecticut for any part of the one year period prior to his (her) application for admission to the University.

Signature: _____

II. I, _____, am married, live with my spouse, and certify that my legal address was in

Connecticut at the time of my application for admission to the University.

Signature: _____

*If certification is that of guardian, copy of Court appointment must be submitted.

Please return immediately to:

Admissions Office
The University of Connecticut
Storrs, Connecticut 06268

PLAINTIFF'S EXHIBIT 'D'

Flaherty Road
Storrs, Connecticut 06268
September 2, 1971

Business Office U-73
The University of Connecticut
Storrs, Connecticut 06268

To Whom It May Concern:

This is to advise you, that, in accordance with the present requirements for out-of-state students, I am paying the fee for an out-of-state student. However, I feel that you do not have the right to regard me as a non-resident and am paying the out-of-state student fee under protest.

Sincerely yours,

MARGARET MARSH KLINE

PLAINTIFF'S EXHIBIT 'E'

Connecticut Public Acts (1971) No. 5, § 126 (June Session).

"Sec. 126. Section 10-329b of said supplement is repealed and the following is substituted in lieu thereof: (a) For the purposes of this section and sections 122 to 125, inclusive, of this act,

(1) "constituent unit of the state system of higher education" means such units as defined in section 10-322;

(2) an "out-of-state student," if single, means a student whose legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut;

(3) an "out-of-state student," if married and living wtih his spouse, means a student whose legal address at the time of his application for admission to such a unit was outside of Connecticut;

(4) a "full-time student" means a student who has been registered and who has been accepted for matriculation at such a unit in a course of study leading to an associate, bachelor or advanced degree or whose course of instruction or credit hour load indicates pursuit toward a degree;

(5) "tuition" means a direct charge for instructional programs, which charge will be deposited to the resources of the general fund and is clearly delineated from any other fees. The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit."

VERIFICATION

Personally appeared before me, MARGARET M. KLINE, and, having read the foregoing complaint, MARGARET M. KLINE does state that she knows the contents hereof and that the allegations herein contained are true, except as to such matters as are known by information and belief, and these she verily believes to be true, and that she believes that she is entitled to the redress sought herein.

L/S
MARGARET M. KLINE

COUNTY OF WINDHAM
STATE OF CONNECTICUT } ss. Willimantic
October 12, 1971

Subscribed and sworn to, before me, at Willimantic, Connecticut, this 12th day of October, 1971.

L/S
JOHN A. DZIAMBA
Commissioner of Superior Court

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

MARGARET MARSH KLINE, *Plaintiff*,
PATRICIA CATAPANO, *Applicant for Intervention*,

v.

JOHN W. VLANDIS, *Defendant*.

CIVIL ACTION NO. 14,680

INTERVENER'S COMPLAINT

1. Patricia Catapano is a citizen of the United States of America and a resident of the Town of Mansfield in the State of Connecticut. She is 22 years of age and single.

2. In January of 1971, Patricia Catapano applied from Athens, Ohio to the University of Connecticut at Storrs, for admission as a graduate student and was accepted in February of 1971.

3. In late August, 1971, Patricia Catapano moved her residence to Connecticut and registered as a full-time student at the University. She was classified by the defendant as an out-of-state student and was required to pay $150.00 as out-of-state tuition for the first semester plus $200.00 out-of-state student fees as compared with no tuition being paid by an in-state student. Upon registration for the second semester, she will be required to pay $425.00 tuition plus a $200.00 out-of-state fee.

5. In classifying the plaintiff as an out-of-state student the defendant has acted under color of Section 10-329(b) of the Connecticut General Statutes (as amended by Public Act, No. 5, Section 126 [June Session, 1971]).

6. Section 10-329(b) sets up two classes of residents by which the plaintiff has been irreversibly and arbitrarily classified as an out-of-state student thereby depriving her of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

7. By reason of this irreversible classification, the plaintiff is being penalized for exercising her fundamental constitutional right to travel freely from one state to another.

8. An irreversible classification based on the plaintiff's residence at the time of her application to the University of Connecticut is arbitrary, capricious and unreasonable.

9. Accordingly, the plaintiff has suffered, is suffering and will continue to suffer immediate and irreparable injury for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays the court to:

1. Declare that Section 10-329(b) of the General Statutes of the State of Connecticut is, on its face or as applied to the plaintiff, invalid and unenforceable under the Constitution of the United States of America.

2. Preliminary enjoin the defendant from acting under the provisions of Section 10-329(b).

3. Permanently enjoin the defendant from acting under the provisions of Section 10-329(b).

4. Grant damages to the plaintiff in an amount to compensate for any loss incurred because of action taken under Section 10-329(b).

5. Grant such other relief as the court may deem appropriate.

VERIFICATION

Personally appeared before me, PATRICIA CATAPANO, and, having read the foregoing complaint, PATRICIA CATAPANO does state that she knows the contents hereof and that the allegations herein contained are true, except as to such matters as are known by information and belief, and these she verily believes to be true, and that she believes that she is entitled to the redress sought herein.

L/S

PATRICIA CATAPANO

STATE OF CONNECTICUT
COUNTY OF WINDHAM } ss. Willimantic
December 9th, 1971

Subscribed and sworn to, before me, at Willimantic, Connecticut, this 9th day of December, 1971.

L/S

JOHN A. DZIAMBA
Commissioner of Superior Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

MARGARET MARSH KLINE

v.

JOHN W. VLANDIS

CIVIL ACTION NO. 14,680

ANSWER TO COMPLAINT

1. Paragraphs 2, 4, 5, 6 and 7 of the Complaint is admitted.

2. Paragraphs 8, 9, 10 and 11 are denied.

3. As to the allegations in Paragraphs 1 and 3, the Defendant is without knowledge or information sufficient to form a belief and leaves the Plaintiff to her proof.

CERTIFICATION

This certifies that a copy of the foregoing has been served on all counsel of record, by depositing same in the United States mails, postage prepaid, on the 23rd day of November, 1971.

L/S
JOHN G. HILL, JR.
Assistant Attorney General

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

MARGARET MARSH KLINE, *Plaintiff*
PATRICIA CATAPANO, *Applicant for Intervention*

v.

JOHN W. VLANDIS, *Defendant*

CIVIL ACTION NO. 14,680

ANSWER TO COMPLAINT OF INTERVENER, PATRICIA CATAPANO

1. Paragraphs 2, 3 and 5 of the Complaint are admitted.

2. Paragraphs 6, 7, 8 and 9 are denied.

3. As to the allegations in Paragraph 1, the Defendant is without knowledge or information sufficient to form a belief and leaves the Plaintiff to her proof.

Dated at Mansfield, Connecticut this 5th day of January, 1972.

ROBERT K. KILLIAN
Attorney General

L/S

By: JOHN G. HILL, JR.
Assistant Attorney General

CERTIFICATION

This certifies that a copy of the foregoing has been served on all counsel of record by depositing same in the United

States mails, postage prepaid, on the 5th day of January, 1972.

L/S
By: JOHN G. HILL, JR.
Assistant Attorney General

OPINIONS

The Opinion of the United States District Court, District of Connecticut, entered June 22, 1972, contained in the Appendix to the Jurisdictional Statement at page 1a.

DEFENDANT EXHIBIT 1—

University of Connecticut Tuition Schedule

1. TUITION SCHEDULE

		In-State	Out-of-State
1971	Tuition	—	$150
	Fee	$145	145
			200
		$145	$495
1972	Tuition	175	425
	Fee	145	145
			200
		$320	$770

2. STUDENT COUNT

Undergraduate	October 15, 1971			
	Undergraduate Total	12,231		
	Out-of-State		1,774	
	Foreign		64	
			1,838	
	Less N.E. program		274	
				1,564
Graduate	Storrs			
	Total	3,456		
	Out-of-State			645
				2,209

3. CALCULATION OF REVENUE SHORTFALL

Total out-of-state students, 2,209 @ $425 per semester =	$938,825
Less 2,209 @ $175 (in-state rate)	386,575
Shortfall in revenue	$552,250

EXCERPTS FROM TRANSCRIPT

(Tr. page 26)

BY MR. DZIAMBA:

Q. Mrs. Kline, part of the record is that you were a student in California when you met Peter Kline and you became engaged.

In the period before you were married had you considered moving to Connecticut?

(Tr. page 27)

A. No, I hadn't. Well, except for the fact that I knew I was going to be married and I knew that we wanted to return to Connecticut.

Q. Did you make any inquiries to the University of Connecticut as to your student status? A. Yes, I did. At the time I applied to the University I also inquired about my residency; if I married a Connecticut resident would I be considered a Connecticut resident also. And I received a mimeographed letter back explaining that, yes, I would be considered a Connecticut resident.

Q. Mrs. Kline, you then married Peter Kline and returned to Connecticut? A. Yes.

(Tr. page 28)

BY MR. DZIAMBA:

Q. Mrs. Kline, can you explain what weight you gave to your anticipation of being classified as a Connecticut resident in your decision to move to Connecticut? A. I still don't understand you.

Q. How much consideration, how much importance was it to your decision to move to Connecticut, your classification

as a Connecticut resident? A. Well, if I was to be classified as a Connecticut resident we would have moved. But if I would have known that I would have been classified as an out-of-state student I would have remained in California.

(Tr. page 29)

Q. When did you find out that you were classified as a Connecticut resident? A. I'm not classified —

Q. I mean not as a Connecticut resident. A. Well, when we arrive in Connecticut I inquired at the University and finally the actual — I received a letter from the University around the 1st of September and (Tr. p. 30) it was informing me that I would be considered an out-of-state student, and accompanied shortly thereafter with an out-of-state fee bill.

(Tr. page 35)

BY JUDGE CLARIE:

Q. As far as California is concerned, are you a voter there? A. I was a registered voter, yes. But I'm going to register as a Connecticut voter now.

(Tr. page 38)

BY MR. HILL . . .

Q. Have you registered to vote in Connecticut?
A. Have I?

Q. Yes. A. No, I haven't, as of yet. I have sent in, however, a letter to them asking them about the procedure.

(Tr. page 42)

BY JUDGE BLUMENFELD:

Q. Well, you didn't come to Connecticut because of any romantic involvement? A. No.

Q. It had something to do with the courses or the quality of education at the University of Connecticut? A. Yes. The professor who is in charge of the field that I am in is well-known throughout the United States and I felt that studying under him would be a benefit to my education.

Q. That's a particular branch of education, is it?
A. Yes.

(Tr. pages 43-44)

BY MR. DZIAMBA:

Q. Miss Catapano, if you had known of the higher tuition rate before you came to Connecticut would that have influenced your decision, in any way, to attend the Education Department at the University of Connecticut? A. Yes, it would have.

Q. In what way? A. I believe I would not have come.

BY MR. HILL . . .

(Tr. page 58)

Q. On this basis, Mr. Carlson, can you estimate what the cost per student would be? Very roughly? A. It's in excess of $2,000 per year per student that the citizens of the state, through its various taxes and revenues, provide for the student.

Q. Now, you had made available to you the first exhibit that was submitted here which shows a revenue shortfall of some $552,250, or roughly half a million dollars. Do you consider that a reasonable estimate or do you consider it modest?

A. I consider it conservative. Two bases:

One, I believe you mentioned it didn't include the branches or the University Law School or the Health Center. So there would be those factors that should be recognized, but it's a conservative number.

And I would also suggest that if this case were successful, that is, the plaintiff were successful, we would be facing the same issue with the other institutions of higher learning which also have a differential.

So the number you show is a very, very conservative number.

Q. Would you also comment on this data from 1967 to date? A. Well, from '67 to date has been the period of most dramatical —

JUDGE BLUMENFELD: Mr. Hill, what is the purpose of this line of inquiry?

We are not concerned with the matter of establishing whether or not there is a budget deficit. What does that have to do with the case?

MR. HILL: The cases indicate, your Honor, that if you are going to question this on an equal protection basis I have the obligation to put some evidence in the record to show that there is public education, the cost of it and I have to establish that the classification of out of state is reasonable.

Now, I would say unless I put in some financial data I would be cut off from developing that issue, and this is the reason why.

I didn't want to take that chance, your Honor.

JUDGE BLUMENFELD: Is there any dispute that the tuition collected does not cover the actual cost of education? Is there any dispute about that?

MR. DZIAMBA: No, there isn't, your Honor.

JUDGE BLUMENFELD: All right.

MR. HILL: Fine, your Honor. Then it's in the record. Then I won't go into any more data.

BY MR. HILL:

Q. Now, Mr. Carlson, getting down to the particular point that is raised here today, there is a differential in tuition between out of state and in state. Do you consider that to be a reasonable way to help finance higher education? A. Yes, based on two basic points. One is a statutory reference of Section 10-117 of the General Statutes makes reference to providing an education for students whose parents are the residents of the state, as well as the level of support that is given by the citizens of this state.

And beyond that, the situation exists that these people have built the university; it's a traditional sort of a thing in the sense the university is there because the citizens of the state have supported it and allowed it to grow and encouraged its growth and the expected return benefit to the state that its graduates will give.

So the out-of-state differential based on these facts I think is entirely reasonable and justified, and the amount of differential from the fiscal standpoint is not unreasonable. The differential is reasonable, but the amount is not unreasonable.

JUDGE BLUMENFELD: You agree with the legislature?

THE WITNESS: Yes sir.

JUDGE BLUMENFELD: Okay.

BY MR. HILL:

Q. Commissioner, as Commissioner of Finance and Control if this revenue were not available under the law what alternatives are available to the state? A. We would have to continue the modification of spending for state agencies, be it the university or whatever it may be.

Q. Why is that, Commissioner? A. Because the Governor, again through the statutes, has an obligation to operate a balanced budget and we are now in that situation, wherein the Governor had to make many severe restrictions in spending of departments and agencies in order to balance the budget. And if this revenue was unavailable, this conservative $550,000, we would have to do one of two things:

Either curtail spending somewhere to that extent at the university, or whoever it may be; or go to the General Assembly when they return next month and ask for an additional source of revenue to the extent of $550,000, conservatively.

MR. HILL: Thank you, Commissioner. That's all.

Supreme Court of the United States

No. 72-493

John W. Vlandis, Director of Admissions,
the University of Connecticut,

Appellant,

v.

Margaret Marsh Kline and Patricia Catapano

APPEAL from the United States District Court for the District of Connecticut.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 4, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. A-98

72-493

JOHN W. VLANDIS, Director of Admissions, The University of Connecticut, *Appellant*,

v.

MARGARET MARSH KLINE and PATRICIA CATAPANO, *Appellees*

On Appeal from a Three-Judge
United States District Court
For The District of Connecticut

JURISDICTIONAL STATEMENT

ROBERT K. KILLIAN
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Assistant Attorney General

30 Trinity Street
Hartford, Connecticut
Attorneys for Appellant

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APPENDIX

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CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. A-98

JOHN W. VLANDIS, Director of Admissions, The University of Connecticut, *Appellant*,

v.

MARGARET MARSH KLINE and PATRICIA CATAPANO, *Appellees*

On Appeal from a Three-Judge United States District Court For The District of Connecticut

JURISDICTIONAL STATEMENT

ROBERT K. KILLIAN
Attorney General of Conn.

JOHN G. HILL, JR.
Assistant Attorney General

30 Trinity Street
Hartford, Connecticut
Attorneys for Appellant

JURISDICTIONAL STATEMENT

Appellant, official of the State of Connecticut, appeals from the judgment of the three-judge United States District Court for the District of Connecticut, entered on June 14, 1972, declaring Connecticut General Statute 10-329(b), as amended by Public Act No. 5, Section 126 (1971) unconstitutional and enjoining the operation of subsections (a)(2), (a)(3) and (a)(5) thereof. This Act provides for tuition at the constituent units of the State system of higher education and also provides a higher level of tuition for out-of-state students. The opinion of the Court is printed as Appendix A of this Statement.

Subsections (a)(2) and (a)(3) of Section 126 define an "out-of-state" student as follows:

> If single, means a student whose legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the State system of higher education was outside Connecticut . . . If married and living with spouse, means a student whose legal address at the time of his application for admission to such unit was outside Connecticut.

Subsection (a)(5) of the statute prohibits any change in status.

> The status of a student as established at the time of his application for admission at a constituent unit of the State system of higher education under the provisions of this Section shall be his status for the entire period of his attendance at such constituent unit.

JURISDICTION

This action to enjoin the operation of subsections (a)(2), (a)(3) and (a)(5) of Connecticut General Statute Section

10-329(b), as amended by Public Act No. 5, Section 126 (1971) was instituted pursuant to 28 U. S. C. 1343, and a statutory three-judge court was convened to consider the injunction request pursuant to 28 U. S. C., Sections 2281 and 2284. The judgment of the District Court was entered on June 22, 1972. Appellant filed notice of appeal with the District Court on June 29, 1972, pursuant to 28 U. S. C. 1253. A copy of the Order and Judgment entered by the District Court and a copy of the Notice of Appeal filed with the District Court are printed as Appendices B & C, respectively. An application to stay the permanent injunction issued by the District Court was denied on July 15, 1972. An application for a similar stay was then addressed to Mr. Justice Marshall on July 18, 1972 and denied on August 3, 1972.

In essence, the Appellant is asking the United States Supreme Court to scrutinize the legislative classification adopted by the Connecticut statute measured by the standard of the equal protection clause, i.e., may any state of facts be assumed which would sustain this classification on a reasonable basis? *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). In this connection it is appropriate to consider that while some minor inequities will result from any classification, they must be measured against the administrative and economic advantages that result therefrom. *Bayside Fish Flour Co.* v. *Gentry*, 297 U.S. 422, 429 (1935); *Walters* v. *City of St. Louis*, 347 U.S. 231, 237 (1954). In fact, this Court has already considered and found reasonable a one-year waiting period for a student to attain in-state status. *Starns* v. *Malkerson*, 326 F. Supp. 254 (D. Minn.) (1970) Aff'd Mem. 39 U.S. L.W. 3423 (1971).

The pertinent sections of the Connecticut statute have already been quoted and are printed as Appendix D.

QUESTIONS PRESENTED BY APPEAL

The basic constitutional question presented by this appeal is whether a state may seek to defer a part of the cost of its educational establishment by imposing a permanent tuition differential requiring specifically defined out-of-state students to pay a higher portion of the cost. It is the State's position that the differential treatment of out-of-state students is reasonably related to a legitimate object or purpose, i.e., secure State funds and permit a partial cost equalization. It should be emphasized that even at its differential level, the out-of-state tuition does not meet the students' average instructional costs, i.e., the State is still subsidizing the out-of-state student. Under the Fourteenth Amendment, governing bodies are endowed with a wide range of discretion in enacting laws which affect some of the residents differently from others and this constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to achieve a state's objective. *Waggoner* v. *Rosenn*, 286 F. Supp. 275, 277 (1968); *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961).

> "... the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation." *Bayside Fish Flour Co.* v. *Gentry*, 297 U.S. 422, 429 (1935).

STATEMENT OF THE CASE

The Appellees, two students enrolled at the University of Connecticut, brought this action in the United States District Court for the District of Connecticut on October 12, 1971, challenging the constitutionality of Section 10-329(b) of the Connecticut General Statutes, as amended by Public Act No. 5. Section 126 (June Session, 1971).

This Act became effective October 1, 1971, and directed the Board of Trustees at the University of Connecticut to

establish a higher tuition for out-of-state students than they charged residents of the State of Connecticut. Subsection (a)(2) of Section 126 of the Statute defines a single out-of-state student as one whose legal address for any part of the one-year period immediately prior to his admission application was outside Connecticut. Subsection (a)(3) of Section 126 of the Statute defines a married out-of-state student as one whose legal address at the time of application was outside Connecticut. Subsection (a)(5) of the Statute states that a student maintains his initial status for the entire period of his attendance at the constituent unit of higher education. They contended specifically that the classification system embodied in the tuition statute violated the due process and equal protection clauses of the United States Constitution. The Appellant is the Director of Admissions at the University of Connecticut, a state official having responsibility for the implementation of the statute.

Since the complaint sought to enjoin a state law as repugnant to the Constitution, a statutory three-judge court was convened. Oral argument was heard on January 7, 1972 and both parties filed briefs. The District Court considered initially the evidence presented by the Appellees purporting to show that since being admitted to the University of Connecticut, they had established bona fide Connecticut residence. On June 14, 1972 the District Court filed its Memorandum of Decision, holding that the Connecticut tuition statute violated the Fourteenth Amendment to the Constitution of the United States and that judgment should enter in favor of the Appellees. On June 21, 1972 the District Court entered its Order and Judgment declaring the classification provisions of the statute unconstitutional and enjoining the Defendant from enforcing subsections (a)(2), (a)(3) and (a)(5) of Connecticut General Statute Section 10-329(b), as amended by Public Act No. 5, Section 126 (1971). On June 29, 1972, the Appellant filed notice of appeal to the Supreme Court and on July 11,

1972, the Appellant moved that the District Court stay the effect of the permanent injunction until the Supreme Court could consider and decide the appeal in this case. This motion was denied by the District Court on July 15, 1972 and a similar motion was made to Mr. Justice Marshall on July 18, 1972, which was denied on August 3, 1972. In its opinion, the District Court relied *inter alia* on the specific fact that both Appellees were registered voters in Connecticut. In fact, both testified, and it is a fact, that at the time of the trial they had *not* registered to vote even though their complaint made such an allegation.

THE ISSUE IS SUBSTANTIAL

The Court based its decision on the constitutional questions on the conclusion that the statute creates an irrebutable presumption of nonresidency that prevails throughout the students' period of attendance at the University. The Court analogized this to the case of *Carrington* v. *Rash,* 380 U.S. 89 (1965) where the Supreme Court invalidated a section of the Texas Constitution prohibiting Texas-based members of the Armed Forces from acquiring Texas residency for voting purposes while in the military service.

We submit that the Court's reliance of *Carrington* v. *Rash* is misplaced. Nothing is more basic to our constitutional system than the right to vote; this right is protected and guaranteed by the Constitution. The state does not create the right to vote — it must be extended to every citizen.

This is very much different from a tuition differential which requires specifically defined out-of-state students to pay a greater portion of the cost, even though not even the total instructional cost, of their education for the period of their attendance. The out-of-state classification system is designed as a reasonable means to secure state funds and permit a partial cost equalization. From the foregoing, we submit that

under the Fourteenth Amendment, legislative bodies are endowed with a wide range of discretion in enacting laws which affect some of the residents differently from others and this constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to achieve a state's objective. *Waggoner* v. *Rosenn,* 286 F. Supp. 275, 277 (1968); *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The resolution of this case will have an immediate and significant effect on all public institutions of higher learning in the United States. We contend, further, that the Court has abused its discretion in granting the Appellees' injunction.

CONCLUSION

The federal questions presented by this appeal are substantial and require plenary consideration by this Court in order to clarify the constitutionally permissible classification of out-of-state students for tuition purposes. It is a question of nationwide significance and it is, therefore, respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General of Connecticut

JOHN G. HILL, JR.
Assistant Attorney General

Attorneys for Appellant

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. 14,680

MARGARET MARSH KLINE and PATRICIA CATAPANO

v.

JOHN W. VLANDIS, *Director of Admissions,*
The University of Connecticut

BEFORE: ANDERSON, *Circuit Judge,*
BLUMENFELD and CLARIE, *District Judges*

MEMORANDUM OF DECISION FINDINGS OF FACT AND CONCLUSIONS OF LAW

BLUMENFELD, District Judge:

In this case, two students enrolled at the University of Connecticut, who are required to pay tuition and other fees at higher rates than residents of Connecticut by reason of the application of Conn. Gen. Stats. § 10-329(b), as amended by Public Act No. 5, § 126 (June Session 1971),[1] challenge the validity of this statute as violative of the due process and equal protection clauses of the United States Constitution. These claims state causes of action under the Civil Rights Act, 42 U.S.C. § 1983, and jurisdiction is properly rested on 28 U.S.C. § 1343(3). See *Lynch* v. *Household Fin. Corp.*, 40 U.S.L.W. 4335 (U.S. Mar. 23, 1972). Since part of the relief sought is an injunction against the enforcement of a state

[1]Involved also are regulations of the University which have followed the relevant portions of the statute in haec verba.

statute on the ground of its unconstitutionality, a three judge district court was convened. See 28 U.S.C. § § 2281 and 2284.

I.

The plaintiff Margaret Marsh Kline is an undergraduate student at the University of Connecticut. In May of 1971, while attending college in California, she became engaged to Peter Kline, a life-long Connecticut resident. On June 26, 1971, they were married at her home in California and soon after they took up residence in Storrs, Connecticut, where they have established a permanent home. Mrs. Kline has a Connecticut driver's license and is registered as a Connecticut voter. The defendant John W. Vlandis, Director of Admissions at the University of Connecticut, has classified Mrs. Kline as an "out of state student" under subsection (a)(3) of § 126, which provides:

> "(A)n 'out of state student,' if married and living with his spouse, means a student whose legal address at the time of his application for admission to such unit was outside of Connecticut; . . . ."

The intervening plaintiff Patricia Catapano applied for admission to the University of Connecticut from Ohio in January 1971 and was accepted in February 1971. In August of that year, she moved her residence to Connecticut and registered as a full-time graduate student. She, too, has a Connecticut driver's license and has been registered as a Connecticut voter. The defendant has classified her as an "out of state student" under subsection (a)(2) of § 126, which provides:

> "(A)n 'out of state student,' if single, means a student whose legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut; . . . ."

For the Fall semester 1971-72 each plaintiff was required to pay $150 for tuition, plus an additional $200 non-resident fee, whereas residents were charged nothing. For the Spring semester 1972 they were each required to pay a tuition fee of $425, plus an additional $200 non-resident fee, as compared to only a tuition fee of $175 paid by students classified as Connecticut residents.[2]

Once the plaintiffs have been classified as "out of state students" they are plainly and explicitly barred from obtaining any change in that status, since the statute commands, subsection (a)(5):

> "The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit."[3]

II.

The plaintiffs do not claim that the statute does not read so as to classify them as non-residents. Rather, their claim is that by providing that they be kept in that class the statute is unconstitutional. The last two clauses of section 1 of the fourteenth amendment to the Constitution of the United States read:

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[2]The plaintiffs' application for a temporary injunction against enforcement of the statute and the regulations thereunder setting up the fee differentials was denied after the court was advised that student loans or grants sufficient to meet the added charges for the Spring semester had been made available to them. See Ruling on Application for a Preliminary Injunction, January 4, 1972.

[3]Shortly after this case was heard, defense counsel informed the court that the legislature, then in session, was considering a bill relating to tuition payments by non-residents which would repeal the particular portions of the statute which are the target of constitutional attack here. Although such a bill was passed (House No. 5302), the view that such legislative action would moot the claims made here lost its validity when the Governor of Connecticut vetoed it on May 18, 1972.

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The plaintiffs rely on both the due process and the equal protection clauses. We do not consider these separately because ". . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive, ..." *Bolling* v. *Sharpe*, 347, U.S. 497, 499 (1954). It is not enough to say that the state has power to treat different classes of persons in different ways, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); the classifications "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano, Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). See also, *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971). Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-resident than on resident students, the state may not classify as "out of state students" those who do not belong in that class. Whether the statute is construed as creating an irrebuttable presumption or as a rule of substantive law, that is what it does. In *Heiner* v. *Donnan*, 285 U.S. 312, 321 (1932), the Court was confronted with a constitutional challenge to a federal statute which imposed a higher tax on transfers of property made by any donor within two years of his death because such transfers "shall be deemed and held to have been made in contemplation of death . . . ." In holding that the statute which imposed a tax upon an assumption of fact which the taxpayer was forbidden to controvert was so arbitrary and unreasonable as to violate the due process clause, the Court said:

> "This Court has held more than once that a statute creating a presumption which operates to deny a fair

opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Id.* at 329.

See also, *Ducharme* v. *Putnam,* 161 Conn. 135, 141-43, ... A.2d ..... (1971). Furthermore, since the irrebuttable presumption in §126(a)(5) freezes the plaintiffs into the classification of "out of state students," they are required to pay higher tuition and fees than "in state students." Thus, the effect of the statute is to deny the plaintiffs equal protection of the laws in violation of the fourteenth amendment.[4] The rule that a conclusive presumption may not be utilized to classify a person as a non-resident when he is in fact a resident was applied in *Carrington* v. *Rash,* 380 U.S. 89 (1965), where the Court invalidated a section of the Texas Constitution which prohibited a member of the armed forces who first established his home in Texas during the course of his military service from satisfying the residency qualifications for a voter so long as he remained a member of the armed forces. The Supreme Court held that by prohibiting all servicemen not residents of Texas before induction "ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.* at 96.

For the foregoing reasons, we hold that Conn. Gen. Stats. § 10-329(b), as amended by Public Act No. 5, § 126 (1971), and the regulations promulgated thereunder by the defendant are unconstitutional in that they violate section 1 of the fourteenth amendment to the Constitution of the United States. We also find that before the commencement of the Spring semester for 1972 each of the plaintiffs was a bona fide

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[4]Since the statute is stigmatized as so arbitrary and unreasonable by its own terms as to be unconstitutional, we do not reach the question of whether to test the validity of the "out of state" classification as being "not merely *rationally related* to a valid public purpose, but *necessary* to the achievement of a *compelling* state interest." *Eisenstadt* v. *Baird,* 40 U.S.L.W. 4303, 4306 n.7 (U.S. Mar. 22, 1972).

resident of the State of Connecticut and conclude that each of them is entitled to a refund of the amounts of tuition and fees paid by her which is in excess of the amounts paid by resident students as tuition and fees for that semester.

The defendant is enjoined from enforcing subsections (a)(2), (a)(3) and (a)(5) of Conn. Gen. Stats. § 10-329(b), as amended by Public Act No. 5, § 126 (1971), and any regulations based thereon.

Enter judgment for the plaintiffs.

Dated: June 14th, 1972.

ROBERT P. ANDERSON
United States Circuit Judge

M. JOSEPH BLUMENFELD
Chief United States District Judge

T. EMMET CLARIE
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. 14,680

MARGARET MARSH KLINE and PATRICIA CATAPANO

v.

JOHN W. VLANDIS, *Director of Admissions,*
The University of Connecticut

JUDGMENT

This cause having come on for hearing on the merits and the Court having filed its Memorandum of Decision, Findings of Fact and Conclusions of Law on June 14, 1972, it is

ORDERED, ADJUDGED AND DECREED

(1) That Conn. Gen. Stats. § 10-329(b), as amended by Public Act No. 5, § 126 (1971), and the regulations promulgated thereunder by the defendant are unconstitutional in that they violate section 1 of the fourteenth amendment to the Constitution of the United States;

(2) That the defendant hereby refund to each of the plaintiffs the amounts of tuition and fees paid by her which is in excess of the amounts paid by resident students as tuition and fees for the 1972 Spring semester; and

(3) That the defendant is enjoined from enforcing subsections (a)(2), (a)(3) and (a)(5) of Conn. Gen. Stats. § 10-329(b), as amended by Public Act No. 5, § 126 (1971), and any regulations based thereon.

Dated at Hartford, Connecticut, this 21st day of June, 1972.

ROBERT P. ANDERSON
United States Circuit Judge

M. JOSEPH BLUMENFELD
Chief Judge, United States District Court

T. EMMET CLARIE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. 14,680

MARGARET MARSH KLINE and PATRICIA CATAPANO
Plaintiffs

v.

JOHN W. VLANDIS, *Director of Admissions,*
The University of Connecticut
Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that John W. Vlandis, Director of Admissions of the University of Connecticut, Defendant in the above-captioned matter, does hereby appeal to the Supreme Court of the United States from the final judgment, entered in this action on June 21, 1972, declaring Connecticut

General Statute Section 10-329(b), as amended by Public Act No. 5, Section 126 (1971), unconstitutional and enjoining the operation of subsections (a)(2), (a)(3) and (a)(5) thereof.

2. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

3. Pursuant to the provisions of Rule 12(1) of the Rules of the Supreme Court of the United States, the Clerk is requested to certify and transmit to the Supreme Court of the United States the entire record of the proceedings herein.

Dated: June 27, 1972

ROBERT K. KILLIAN
Attorney General

By: JOHN G. HILL, JR.
Assistant Attorney General
University of Connecticut
Gulley Hall U-135
Storrs, Connecticut 06268

APPENDIX D

PUBLIC ACT NO. 5

AN ACT CONCERNING REVENUE SOURCES FOR THE STATE OF CONNECTICUT.

SEC. 126. Section 10-329b of said supplement is repealed and the following is substituted in lieu thereof: (a) For the purposes of this section AND SECTIONS 122 TO 125, INCLUSIVE, OF THIS ACT, (1) "constituent unit of the state system of higher education" means such units as defined in section 10-322; (2) an "out-of-state student," if single, means a student whose [last] legal address FOR ANY PART OF THE ONE-YEAR PERIOD IMMEDIATELY prior to [acceptance] HIS APPLICATION for admission at a constituent unit of the state system of higher education was outside of Connecticut; (3) an "out-of-state student," if married and living with his spouse, means a student whose legal address at the time of [registration at] HIS APPLICATION FOR ADMISSION TO such a unit was outside of Connecticut; (4) a "full-time student" means a student who has been registered and who has been accepted for matriculation at such a unit in a course of study leading to an associate, bachelor or advanced degree or whose course of instruction or credit hour load indicates pursuit toward a degree; (5) "tuition" means a direct charge for instructional programs, which charge will be deposited to the resources of the general fund and is clearly delineated from any other fees. THE STATUS OF A STUDENT, AS ESTABLISHED AT THE TIME OF HIS APPLICATION FOR ADMISSION AT A CONSTITUENT UNIT OF THE STATE SYSTEM OF HIGHER EDUCATION UNDER THE PROVISIONS OF THIS SECTION, SHALL BE HIS STATUS FOR THE ENTIRE PERIOD OF HIS ATTENDANCE AT SUCH CONSTITUENT UNIT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-493

JOHN W. VLANDIS, Director of Admissions, The University of Connecticut, *Appellant*,

v.

MARGARET MARSH KLINE and PATRICIA CATAPANO, *Appellees*

On Appeal from a Three-Judge United States District Court For The District of Connecticut

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

ROBERT K. KILLIAN
Attorney General of Conn.

JOHN G. HILL, JR.
Assistant Attorney General
30 Trinity Street

Hartford, Connecticut
Attorneys for Appellant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-493

JOHN W. VLANDIS, Director of Admissions, The University of Connecticut,
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v.

MARGARET MARSH KLINE and PATRICIA CATAPANO,
Appellees

On Appeal from a Three-Judge
United States District Court
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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

ROBERT K. KILLIAN
Attorney General of Conn.

JOHN G. HILL, JR.
Assistant Attorney General

30 Trinity Street
Hartford, Connecticut
Attorneys for Appellant

FACTS

The Appellant agrees with the factual material in Appellees' Motion to Affirm under the headings "Question Presented" and "Statement of Case", except that both Appellees were *not* registered to vote in Connecticut at time of trial. Appellees unfortunate assertion that they were registered voters is simply not true.

ARGUMENT

The Appellant's argument has already been outlined in its Jurisdictional Statement. Basically, it is that a lower in-state tuition is a *privilege* granted to certain classes of bona fide residents in the State; that the Legislature may adopt rational criteria for classifying "out-of-state" students, who in turn will be required to pay a higher tuition, but still not the full cost of their education.

In essence, the Appellant is asking the United States Supreme Court to scrutinize the legislative classification adopted by the Connecticut statute measured by the standard of the equal protection clause, i.e., may any state of facts be assumed which would sustain this classification on a reasonable basis? *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). In this connection it is appropriate to consider that while some minor inequities will result from any classification, they must be measured against the administrative and economic advantages that result therefrom. *Bayside Fish Flour Co.* v. *Gentry*, 297 U.S. 422, 429 (1935); *Walters* v. *City of St. Louis*, 347 U.S. 231, 237 (1954). In fact, this Court has already considered and found reasonable a one-year waiting period for a student to attain in-state status. *Starns* v. *Malkerson*, 326 F. Supp. 254 (D. Minn.) (1970) Aff'd Mem. 39 U.S.L.W. 3423 (1971).

The Court below based its decision on the constitutional questions on the conclusion that the statute creates an irrebutable presumption of nonresidency that prevails throughout the students' period of attendance at the University. The Court analogized this to the case of *Carrington* v. *Rash*, 380 U.S. 89 (1965) where the Supreme Court invalidated a section of the Texas Constitution prohibiting Texas-based members of the Armed Forces from acquiring Texas residency for voting purposes while in the military service.

We submit that the Court's reliance of *Carrington* v. *Rash* is misplaced. Nothing is more basic to our constitutional system than the right to vote; this right is protected and guaranteed by the Constitution. The state does not create the right to vote — it must be extended to every citizen.

This is very much different from a tuition differential which requires specifically defined out-of-state students to pay a greater portion of the cost, even though not even the total instructional cost, of their education for the period of their attendance. The out-of-state classification system is designed as a reasonable means to secure state funds and permit a partial cost equalization. From the foregoing, we submit that under the Fourteenth Amendment, legislative bodies are endowed with a wide range of discretion in enacting laws which affect some of the residents differently from others and this constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to achieve a state's objective. *Waggoner* v. *Rosenn*, 286 F. Supp. 275, 277 (1968); *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

While it is our position that the Court's reliance on *Carrington* v. *Rash* is misplaced, unfortunately the trial court's decision in *Kline* v. *Vlandis* has already served as a stimulus to litigation throughout the country. For instance, a three-judge federal court in Colorado, citing *Kline* v.

Vlandis, has declared unconstitutional the tuition criteria at that state's university. The Colorado statute provided for a presumption of continued out-of-state status unless the student took less than eight hours of courses per semester or ceased attendance for a year. *Covell* v. *Douglas, et al,* (No. 25351), ____ F. Supp. ____.

The Colorado Court cited *Kline* v. *Vlandis* and *Robertson* v. *Regents* of the University of New Mexico, (No. 9515), ____ F. Supp. ____, in which a federal court declared the tuition statute of that state unconstitutional.

Similar litigation is also pending in at least Michigan, Oregon and Maryland and most probably in many other states in the near future.

We feel the central issue in all this increasing litigation is the misplaced reliance on *Carrington* v. *Rash* by the trial court in *Kline* v. *Vlandis.* We thus urge that the time is ripe for the United States Supreme Court to provide an authoritative determination of this problem of nationwide significance, and respectfully request that probable jurisdiction should be noted.

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General of Connecticut

JOHN G. HILL, JR.
Assistant Attorney General

Attorneys for Appellant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-493

JOHN W. VLANDIS, Director of Admissions, The University of Connecticut, *Appellant*,

v.

MARGARET MARSH KLINE and PATRICIA CATAPANO, *Appellees*

Appeal From The United States District Court for The District of Connecticut

FILED SEPTEMBER 22, 1972
PROBABLE JURISDICTION NOTED DECEMBER 4, 1972

ROBERT K. KILLIAN
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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JOHN W. VLANDIS, Director of Admissions, The University of Connecticut, *Appellant,*

v.

MARGARET MARSH KLINE and PATRICIA CATAPANO, *Appellees*

Appeal From The United States District Court for The District of Connecticut

FILED SEPTEMBER 22, 1972
PROBABLE JURISDICTION NOTED DECEMBER 4, 1972

APPELLANT'S BRIEF ON THE MERITS

The opinion of the Court below is reported at 346 F. Supp. 438 (1972)

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1343, and a statutory three-judge court was convened to consider appellee's request for an injunction pursuant to 28 U.S.C., Sections 2281 and 2284. The judgment of the District Court was entered on June 22, 1972. Appellant filed notice of appeal with the District Court on June 29, 1972, pursuant to 28 U.S.C. 1253. A copy of the Order and Judgment entered by the District Court and a copy of the Notice of Appeal filed with the District Court are printed as Appendices B & C, respectively of the Jurisdictional Statement.

An application to stay the permanent injunction issued by the District Court was denied on July 15, 1972. An application for a similar stay was then addressed to Mr. Justice Marshall on July 18, 1972 and denied on August 3, 1972. This court noted probable jurisdiction on December 4, 1972.

APPLICABLE LAW

The Connecticut statute which is being questioned by the Appellees in this action is Public Act No. 5 enacted by the June 1971 Special Session of the General Assembly. Section 122 of that Act states as follows:

> ". . . the Board of Trustees of the University of Connecticut shall fix fees for tuition of not less than three hundred fifty dollars for residents of this State and not less than eight hundred fifty dollars for nonresidents . . ."

Section 126 of said Act states that:

> ". . . an 'out-of-state student', if single, means a student whose legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut; . . . an 'out-of-state student', if married and living with his spouse, means a student whose legal address at the time of his application for admission to such a unit was outside of Connecticut . . . The status of a student as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit."

QUESTION FOR REVIEW

MAY THE STATE OF CONNECTICUT SEEK TO DEFER A PART OF THE COST OF ITS EDUCATIONAL INSTITUTIONS BY IMPOSING A PERMANENT TUITION DIFFERENTIAL REQUIRING SPECIFICALLY DEFINED OUT-OF-STATE STUDENTS TO PAY A HIGHER PORTION OF THE COST OF THEIR EDUCATION?

STATEMENT OF THE CASE

The Appellee, Margaret Marsh Kline, in May of 1971, while attending California State College at Haywood, as a California resident, applied to the University of Connecticut for admission as an undergraduate student. In June of 1971, the Appellee and Peter Kline intermarried in California and moved to Storrs, Connecticut. Prior to his time in California and also Arizona, Peter Kline had been a resident of Connecticut.

On September 2, 1971 the Appellant Vlandis informed Mrs. Kline that pursuant to Section 10-329(b) of the Connecticut General Statutes, as amended by Public Act No. 5 of the June 1971 Special Session of the General Assembly, she was being classified as an out-of-state student and would be required to pay $425.00 semester tuition as of January, 1972 (resident tuition is $175.00).

Patricia Catapano, in January, 1971, while an undergraduate in Ohio, applied for admission as a graduate student at the University of Connecticut. She was accepted in February, 1971, and moved to Connecticut in August. As with Mrs. Kline, Miss Catapano was classified as an out-of-state student.

Both Appellees now live in Connecticut and have Connecticut-registered motor vehicles and operator's licenses.

However, neither had registered to vote in any Connecticut town as of the date of the hearing, despite representations to the contrary in their trial brief, and in the Opinion of the court below. Tr. p. 42, 43. Appendix p. 22a.

The statutory three judge court found that the Connecticut statute was unconstitutional in that it violates section 1 of the fourteenth amendment to the Constitution of the United States. The court relied primarily on *Carrington* v. *Rash*, 380 U.S. 89 (1965) as authority for the proposition that it is not proper to create such a conclusive presumption of nonresidency as attempted by the statute. The court also found that the statute was so arbitrary and unreasonable that it was not necessary to reach the question of whether it should be analyzed by the Rational Basis or Compelling State Interest tests.

ARGUMENT

Introduction

It should be noted at the outset that this case was neither brought, decided below, tried or appealed in the form of any challenge to the right of the State of Connecticut to impose a higher tuition for nonresident students. Several jurisdictions have already recognized the propriety of such a differential and this Court has affirmed one such determination. *Starns* v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971). See also *Johns* v. *Redeker*, 406 F.2d 878 (8th Cir.), cert. den. sub nom. *Twist* v. *Redeker*, 396 U.S. 853 (1969). See also *Bryan* v. *Regents of University of California*, 188 Cal. 559, 205 p. 1071 (1922); *Clarke* v. *Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966); *Clarke* v. *Redeker*, 406 F.2d 883 (8th Cir.), cert. den. 396 U.S. 862 (1969); *Kirk* v. *Board of Regents of Univ. of California*, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1st Dist. Ct. App. 1969), app. dism. 396 U.S. 554, 90 S. Ct. 754, 24 L. Ed. 2d 747 (1970);

Thompson v. *Board of Regents of University of Neb.*, 187 Neb. 252, 188 N.W. 2d 840 (1971); *Glusman* v. *Trustees of the University of North Carolina*, 281 N. C. 620, 190 S.E. 2d 221 (1972).

The narrow issue herein presented is then not the existence of the differential, but the propriety of continuing a student's initial classification throughout his attendance at the Connecticut institution of higher education. In this connection, it should be noted that an individual may delay his studies and establish in-state residency for a future application. The classification is thus not truly "permanent."

Relevant Standard of Law: The Rational Basis Test

The District Court declined to specify whether the Rational Basis or Compelling State Interest test was applicable to this tuition situation, stating briefly in a footnote:

> "Since the statute is stigmatized as so arbitrary and unreasonable by its terms as to be unconstitutional, we do not reach the question of whether to test the validity of the "out of state" classification as being 'not merely *rationally related* to a valid public purpose, but *necessary* to the achievement of a *compelling* state interest.' *Eisenstadt* v. *Baird*, 40 U.S.L.W. 4303, 4306 N. 7 (U.S. Mar. 22, 1972)." *Kline* v. *Vlandis*, 346 F. Supp. 438, 443 (1972).

In fact, in the *Eisenstadt* case the court found that the statute satisfied neither test. We submit that failing to utilize either standard, the district court erred. Any approach to this constitutional issue necessitates an initial consideration of a threshhold question, i.e., what standard of law should be utilized in the Court's analysis, the Rational Basis test, or the more stringent Compelling State Interest? We submit that it is the former, and that the basic question of law is

the scope of the equal protection requirement that a state may not treat persons differently unless there is a legitimate difference in their classification, and that any such differential must be rationally related to a legitimate state object or purpose. In sum, the issues are reasonableness of classification and rational means.

An examination of the cases utilizing the Compelling State Interest test indicates that certain distinctive features must be evident; in particular, a statute based upon "suspect criteria," e.g., race, or affect upon a fundamental right. Clearly, the former issue is not raised by the Connecticut statute. The Appellees do assert, however, that the latter element is present in the instant case, citing *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) on the right to interstate travel. In the *Shapiro* case, this Court rejected as unconstitutional Connecticut statutes which denied welfare benefits to individuals who did not satisfy a one-year residency requirement.

Appellees' reliance on *Shapiro* is misplaced, as is apparent in the Court's statement in that case that "We imply no view of the validity of waiting periods or residence requirements determining . . . eligibility for tuition, free education . . . ." *Shapiro* at 638, N. 21. Indeed, the cases of *Starns* v. *Malkerson, Kirk* v. *Board, Thompson* v. *Board,* and *Glusman* v. *Trustees,* cited above, were post *Shapiro* cases which, utilizing a Rational Basis approach, dealt with durational residency requirements, and in which the Courts distinguished the situation from that of welfare payments.

The stated bases for such a distinction were the purposes of the statute, and the degree of possible impact on the plaintiff. *Starns* v. *Malkerson,* 326 F. Supp. 234, 237 (1970). In the *Shapiro* case the Court specifically found that the purpose of the legislature was to deter the immigration

of indigents into the state, i.e., to affect interstate travel. The record in the instant case is devoid of such implication. Indeed, Commissioner Carlson's testimony clearly establishes that the purposes were purely financial. Tr. p. 60, 61 appendix p. 25a, 26a.

The distinction between welfare and tuition is even more pronounced when one considers the relative impact on affected individuals. Many persons in the past have immigrated into Connecticut in search of employment. A denial of welfare possibilities during their first crucial year in the state could clearly discourage their moving in the first place. Prospective students, on the contrary, usually are in the state only for the educational opportunities, and lack anything approaching domiciliary intent. As the court stated in *Starns* v. *Malkerson:*

> "while we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro* involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children . . . . Charging higher tuition fees cannot be equated with granting subsistence to one class of needy residents while denying it to an equally needy class of residents. For the above reasons, we conclude that this is not a case of an infringement of a fundamental right and thus the exacting standards of the compelling state interest have no application. *Starns* v. *Malkerson,* 326 F. Supp. 234, 238 (1970).

The same logic is clearly applicable to the Connecticut situation. The proper test is, as in other tuition cases cited above, the Rational Basis doctrine, i.e., is Connecticut's system of classifying out-of-state students for tuition purposes reasonably related to the legitimate state object or purpose of

securing state funds and permitting a partial cost equalization (out-of-state tuition still falls short of the average instructional cost per student).

This theory of statutory analysis preserves the flexibility of the State legislatures to enact measures designed to meet the particular problems in their own jurisdictions; it is a legal doctrine which wisely recognizes the practical workings of the federal system. Accordingly, state governing bodies are endowed with a wide range of discretion in enacting laws which affect some classes of persons differently from others, and the federal constitutional safeguard is offended only in the most extreme situations.

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Mayland*, 366 U.S. 420, 425 (1961).

The Fourteenth Amendment does not take the power to classify from the state; nor does it require that a classification be found invalid because it ". . . is not made with mathematical nicety or because, in practice, it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), *Dandridge* v. *Williams*, 397 U.S. 471 (1970). The basic test is not the existence of isolated instances of some inequalities, but whether any state of facts can be conceived that would sustain the classification. In addition, the existence of such a state of facts should be assumed by the Court. *Morey* v. *Doud*, 354 U.S. 457 (1957); *Lindsley*, supra.

Improper Analogy With Voting Rights

The Appellees and the District Court in the instant case rely on *Carrington* v. *Rash*, 380 U.S. 89 (1965) to support the position that the statutory provision violates the Equal Protection Clause. The Appellees and the District Court contend that the statute creates an irrebutable presumption of nonresidence, and that such a conclusive presumption may not be used to classify a person as a resident when he is, in fact, a resident under *Carrington*, supra.

Carrington was decided not under the Rational Basis test but under the Compelling State Interest test, which we contend is not applicable here. In *Carrington*, the Supreme Court struck down a section of the Texas Constitution which prohibited a member of the armed forces who made a home in Texas during the time of his military service from satisfying the residency classifications for a voter so long as he continued his military service. The Court in that case was dealing with the infringement of the fundamental right to vote and employed the strict standards of the Compelling State Interest test.

> "We deal here with matters close to the course of our constitutional system. 'The right . . . to choose,' *United States* v. *Classic*, 313 U.S. 229, 314 (. . .), that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit." *Carrington*, 380 U.S. at 96.

The *Carrington* Doctrine was further refined by the 1968 case of *Kramer* v. *Union Free School District*, 395 U.S. 621 (1968) which clearly established that voting rights cases are in a class by themselves, and that any statute affecting them will be carefully and meticulously scrutinized.

> "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer*, 395 U.S. at 626.

The Court also clarified the distinction between voting rights statutes and other enactments of state legislatures when it observed that

> "The presumption of constitutionality and the approval given 'Rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people." *Kramer*, 395 U.S. at 628.

We submit a proper reading of these cases demonstrates that Rational Basis is the proper approach to the Connecticut statute.

Application of Rational Basis Test to Tuition Differentials

In the application of the Connecticut statute, it should be noted that the residence requirements at the state university are applied equally to persons in identical classes. All new residents of the state are required to pay a greater portion of the cost, even though not the total instructional cost, of their education for the period of their attendance. It is firmly established that legislation may apply to a particular class if the classification itself is reasonable and founded on some natural intrinsic or constitutional distinction. *Shapiro* v. *Thompson*, (1969), 394 U.S. 618; *Bryan* v. *The Regents of the University of California*, (1922), 188 Cal. 559; *Newman* v. *Graham*, (1960), 82 Ida. 90, 91, 349 P.2d 716.

It is not here suggested that some hardships may not result from this classification, as with all classifications; however, the few inequities that may result are minute in comparison to the administrative and economic advantages that result. *Bayside Fish Flour Company* v. *Gentry,* supra, 297 U.S. 422 (1935); *Walters* v. *City of St. Louis,* 347 U.S. 231 (1954).

Commissioner Carlson outlined in his testimony the financial requirements of the State of Connecticut, with particular attention to the extent of expenditures for higher education generally and for the University of Connecticut in particular. Of special significance is the fact that the average cost of educating a student at the University of Connecticut is over $2,000.00, a sum well in excess of any tuition and fees levied at the institution. The Commissioner presented his expert opinion that a tuition differential for out-of-state students represented a reasonable means to secure state funds and would also permit a partial cost equalization. Tr. p. 60, 61 Appendix p. 25a.

It is the position of the Appellant that the legislative classification of Section 10-329(b) is reasonable. It is based upon the rational assumption that the resident or his parents have supported the State in the past and will continue to do so in the future. In addition, the State's educational facilities are limited, and it is only appropriate that established residents should be favored, since their contribution is more certain.

The Appellees have relied on such post *Shapiro* cases as *Clark* v. *Redeker,* (1969); *Kirk* v. *Board of Regents,* (1969); and *Starns* v. *Malkerson,* (1970). Careful scrutiny of these cases demonstrates that in each instance, the educational institution successfully defended a durational waiting period on the very grounds that the Appellant urges in this cause. Any language beyond that issue is pure dicta.

Since the decision of the District Court in the instant case, courts in at least two other jurisdictions have rendered similar decisions, Colorado in *Covell* v. *Douglas*, ____ Colo. ____ (1972) and New Mexico in *Robertson* v. *Regents*, (No. 9515), ____ F. Supp. ____ (1972). We submit that these cases relied on the trial court's decision in *Kline* v. *Vlandis*, a decision we urge the court to overrule. We are of the opinion that the better view is expressed by two recent cases decided by the Supreme Courts of North Carolina and Nebraska.

The trustees of the University of North Carolina have adopted a regulation with a durational requirement of six months while not in attendance at an institution of higher education. The student plaintiffs relied heavily on *Carrington* v. *Rash* in their demand for reclassification. The Supreme Court of North Carolina quickly disposed of this contention, ruling that:

> "A person's right to eligibility for in-state tuition is quite different from his basic constitutional right to travel freely from one state to another, or his basic constitutional right to vote . . . . We take notice of the stipulation that the regulations in the present case do not impede inter-state travel. Since they do not relate to basic constitutional rights, the regulations are to be tested by the less stringest traditional equal protection standards." *Glusman* v. *Trustees of University of North Carolina*, 281 N. C. 620, 629, 190 S.E. 2d 213, 219 (1972).

The court was also of the opinion that not giving effect to a domicile while attending the university was a reasonable approach to the problem of classification.

> "The State has no obligation to provide educational opportunities to noncitizens. Its interests require that it

> subsidize only those students whom it may be certain are North Carolina citizens. Moreover, uncertainty as to the circumstances under which the tuition status of students may change is fiscally and administratively undesirable . . . That there may be hardship cases resulting from the enforcement of these regulations is also not to say they are unreasonable. The constitutional test is whether the regulations have tended in general to assure that only North Carolina citizens get the benefit of in-state tuition. We hold that they have." *Glusman*, 190 S.E. 2d at 220.

A similar situation occurred in Nebraska where the State legislature set a four-month durational requirement while not in attendance at an institution of higher learning. After analyzing *Shapiro* and *Carrington* v. *Rash* the Supreme Court of Nebraska concluded that the Rational Basis test applied. In applying this test it found that the statutory approach was reasonable.

> "In classifying students for the purpose of charging tuition, the state had the legitimate objective of attempting to achieve a partial cost equalization between those persons who have, and those who have not, recently contributed to the state's economy through employment, tax payments, and expenditures within the state. Such an objective is clearly a "reasonable justification" for the discrimination in tuition." *Thompson* v. *Board of Regents*, 187 Neb. 252, 188 N.W. 2d 840, 843 (1971).

It found further that while there may be hardships in close cases, the state's approach was a rational attempt to handle a difficult problem.

"The Nebraska statute is reasonably designed to protect a legitimate state interest and to secure the bona fides of the claimed intent regarding the residence of a person coming from another state for the avowed and immediate purpose of securing the educational facilities of this state and eschewing the facilities of the state of his prior residence.

"It may be that the statutory standard is occasionally imprecise and imperfect in its application to the relatively unique circumstances of a particular case such as is claimed for the plaintiff here. However, as we have seen, this cannot be used as the basis for striking down the tuition classification here. A state is not required by the equal protection clause to choose between attacking every aspect of a problem or making no effort at all. It is enough if the regulation has a rational basis and does not invidiously discriminate."

Thompson, 188 N.W. 2d at 844.

On its face the "permanent" Connecticut classification system might seem to differ from the durational requirements of North Carolina and Nebraska. Such a conclusion is superficial since there is no prohibition against an individual delaying his attendance at a Connecticut institution, establishing bona fide residence for a year, and then applying for admission as an in-state student. In effect then, the Connecticut statute provides for a one year durational test similar to that of North Carolina and Nebraska.

The adoption of standards such as those used by North Carolina, Nebraska and Connecticut has a further statutory

purpose. Domiciliary intent is often difficult to determine for college students who seldom have set plans for their future homes. Use of durational requirements provides a degree of administrative certainty for both the institution and the student. By fixing a student's residence status in this manner the state insures that its bona fide in-state students will receive their full subsidy. A student who was initially classified as out-of-state should not be granted in-state status by virtue of his having remained in the state in order to enjoy the privilege of state supported education, which he has not supported through taxes. Remaining in the state for purposes of education hardly constitutes an indicia of domiciliary intent.

CONCLUSION

The reported cases indicate the existence of considerable doubt as to the proper application of the Fourteenth Amendment to durational residence requirements necessary to attain in-state status for tuition purposes. It is the appellant's position that judicial analysis should procede by way of the Rational Basis test. It is our further position that application of this test demonstrates that the provisions of the Connecticut statute properly provide a reasonable basis for securing additional state funds and attain a partial equalization of the costs of education.

It is thus our contention that the Connecticut statute is sound not only legally but as a matter of policy. Were the states to be prohibited from such reasonable attempts at fund raising and cost equalization, the result could very well be stringent restrictions on the acceptance of out-of-state applicants. Had such a legally permissible policy been in effect,

neither Mrs. Kline nor Miss Catapano would have been admitted to the University of Connecticut at the time of their application.

In our opinion, the tuition differential is basically a question of educational and financial policy which each state must meet in its own way.

Respectfully submitted,

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IN THE

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OF THE

UNITED STATES

OCTOBER TERM, 1972

No. 72-493

JOHN W. VLANDIS, Director of Admissions,
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Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF AMICUS CURIAE
State of Washington

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BRIEF OF AMICUS CURIAE
State of Washington

INTEREST OF AMICUS CURIAE

As is true in most states, the legislature of the State of Washington has enacted a law establishing the state residency or non-residency of students as a basis for determining tuition charges for students enrolling at state institutions of higher education. Specifically, as set forth in Chapter 28B.15 RCW, last amended by Chapter 149, Laws of 1972, 1st ex. sess., the law requires such institutions to charge higher tuition rates to non-resident students. In determining who qualifies as a resident student for

purposes of determining tuition, the law provides in RCW 28B.15.012 that:

> "(2) The term 'resident student' shall mean *a student who has had a domicile in the state of Washington for the period of one year immediately prior to the time of commencement of the first day of the semester or quarter for which he has registered at any institution* and has in fact established a bona fide domicile in this state for other than educational purposes: Provided, That a nonresident student enrolled for more than six hours per semester or quarter shall be considered as attending for educational purposes only, and for tuition and fee paying purposes only such period of enrollment shall not be counted toward the establishment of a bona fide domicile of one year in this state unless such student proves that he has in fact established a bona fide domicile in this state for other than educational purposes." (Emphasis supplied.)

In September, 1972, an action was filed against the State of Washington and its University of Washington, *inter alia*, in the United States District Court for the Western District of Washington by non-resident students at the University of Washington (*Sturgis et al. v. State of Washington, University of Washington, et al.*, Civil Action No. 614-72C2) seeking to have this non-resident tuition law declared unconstitutional and enjoining the defendants from implementing and enforcing any of its provisions. The plaintiffs are contending that the law not only violates their constitutional rights to travel, due process, and equal protection of the laws, but that the durational one-year residency require-

ment for establishing domicile violates the United States Constitution by creating a distinction between state residents which is arbitrary and for which there is no compelling state interest.

An order has been entered in *Sturgis* convening a three-judge court but hearing has apparently been delayed by that court pending a decision in this matter by this Court.

Thus, the interest of the State of Washington in submitting this brief as *amicus curiae* is clear in that the disposition of the instant case by this Court may well affect the disposition of *Sturgis* by the United States District Court, thereby directly affecting the interests of the State of Washington.

While the State of Washington, in submitting this brief, urges the Court in the instant case to uphold the constitutionality of the Connecticut statute which requires a higher tuition fee for non-resident students than for students who are residents of that state, if this Court determines that the Connecticut statute is unconstitutional, then the State of Washington respectfully submits that such decision should be harmonized with this Court's previous decision in *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), Aff'd without opinion 401 U.S. 985, 28 L. Ed. 527, 91 S. Ct. 1231 (1971). In *Starns* this Court affirmed the United States District Court decision upholding the constitutionality of a state university regulation establishing a one-year durational residency requirement for tuition purposes. *Amicus* contends that *Starns*, together with a long line of decisions by both federal and state courts regarding

similar state statutes or regulations, has established the constitutionality of durational (one year or less) residency requirements for tuition purposes and that, therefore, these previous rulings should be clearly distinguished from a ruling by this Court that the Connecticut statute, which bars a change from non-resident to resident status by a student enrolled at one of its institutions of higher education, is unconstitutional.

ARGUMENT

I. Original Durational Residency Requirements for Purposes of Tuition are Constitutional.

Both federal and state courts have consistently held that it is constitutionally permissible for states to distinguish between residents and non-residents when assessing tuition fees for their institutions of higher education. See *Starns v. Malkerson, supra; Johns v. Redeker*, 406 F.2d 878 (8 Cir. 1969); *Clarke v. Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966); *Thompson v. Board of Regents of University of Nebraska*, 187 Neb. 252, 188 N.W.2d 840 (1971); *Kirk v. Board of Regents of University of California*, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), dismissed on appeal, 396 U.S. 554 (1970); *Landwehr v. Regents of Colorado*, 156 Colo. 1, 396 P.2d 451 (1964); *Bryan v. Regents of the University of California*, 188 Cal. 559, 205 Pac. 1071 (1922).

Furthermore, federal and state courts have sustained (one-year and less) durational residency requirements as a condition to qualification for lower resident tuition rates. See *Starns v. Malkerson, supra; Thompson v. Board of Regents of the University*

of Nebraska, supra; Kirk v. Board of Regents of University of California, supra.

It was thought that the United States Supreme Court case of *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), which struck down the one-year residency requirement for welfare recipients might foretell a similar result for non-resident tuition provisions. *Shapiro* held that the imposition of a residency requirement on welfare recipients constituted an infringement on a "fundamental interest" of the recipient, i.e., the right to travel, and could only be justified by a compelling state interest. Merely showing a "reasonable or rational basis" for the requirement was insufficient. However, the 1971 decision of *Starns v. Malkerson, supra*, which was affirmed by this Court, upheld a Minnesota state regulation which required one year's residency before qualifying as a resident for tuition purposes. In that case, Judge Lord, speaking for the three-judge court, stated:

> "[W]e conclude that this is not a case of an infringement of a fundamental right and thus the exacting standards of the compelling state interest test have no application. Unlike *Shapiro*, we find the one-year durational residence requirement challenged here does not constitute a penalty upon the exercise of the constitutional right of interstate travel and thus the regulation's constitutionality should be tested under the traditional equal protection standards." (*Starns v. Malkerson*, p. 238)

In reaching its conclusion, the Court noted that the tuition residency requirements were not even in part designed to deter any appreciable numbers of

persons from moving into the state, and the operation of the requirement has no "chilling effect" on the assertion of the constitutional right to travel. Furthermore, the Court was unwilling to equate the value of attaining a higher education with the necessity of attaining food, clothing, and shelter for one's self and one's dependents.

Addressing itself to the contention that the one-year rule created an irrebuttable classification which was arbitrary and unreasonable, the Court held that since the classification was only for one year it was not permanent or arbitrary but, instead, created a rebuttable presumption that was related to a legitimate state objective—funding of financing, operating and maintaining the state's education institutions.

Subsequent to the *Starns* decision, a state statute establishing a similar requirement for a shorter period (four months) was upheld by the Supreme Court of the State of Nebraska, *Thompson v. Board of Regents of University of Nebraska, supra.*

II. The Connecticut Statute Distinguished

In the instant case, the respondents were classified as "out-of-state students" under applicable provision of the Connecticut statute, Conn. Gen. Stats., § 10-329(b) as amended by Public Act No. 5, § 126 (June Session, 1971). Under the language of subsection (a)(5) of that statute, they were barred from obtaining any change in that status during the period of their attendance at the institution. Subsection (a)(5) provides:

"The status of a student, as established at the

time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit."

The State of Washington submits that the type of permanent classification or conclusive presumption found in the Connecticut statute is clearly distinguishable from such durational residency requirements as are found in *Starns v. Malkerson*, *supra*, and as are contained in the Washington statute set forth, *supra*, p. 2. The former clearly precludes any student from ever becoming a resident for tuition purposes once he has been classified as a non-resident, whereas the latter merely creates a one-year durational residency requirement which, as pointed out by the Court in *Starns*, is neither permanent nor arbitrary, and is tied to a legitimate state objective.

If this Court finds that subsection (a)(5) of the Connecticute statute is impermissibly arbitrary and thus violative of the fourteenth amendment's due process and equal protection clauses, *amicus* respectfully urges that the Court follow the examples of the three-judge New Mexico United States District Court in *Robertson v. Regents of the University of New Mexico*, No. 9515, ... F. Supp. ..... (August 3, 1972), and of the Supreme Court of the State of Colorado in *Covell v. Douglas*, ... Colo. ....., 501 P.2d 1047 (1972). In both cases, the courts were considering the constitutionality of statutory provisions similar to subsection (a)(5) of the Connecticut statute. While both courts found the statutory provisions which effectively barred a

change from non-resident to resident status by students enrolled at affected state institutions constitutionally offensive, they limited their ruling to that precise question. The Colorado court expressly upheld the right of the state to differentiate between resident and non-resident students for tuition purposes, while the New Mexico court observed that "no issue has been raised herein with respect to either the power of the State of New Mexico to establish a one year durational residency requirement for payment of resident tuition or the power of the State of New Mexico to establish the age of majority, and no ruling is made thereon."

CONCLUSION

In *Starns v. Malkerson*, *supra*, the United States District Court for the District of Minnesota determined that a state could constitutionally create a one-year durational residency classification for tuition purposes. Its decision was affirmed by this Court without opinion. Futhermore, decisions by both federal and state courts, decided both prior and subsequent to *Starns*, have upheld similar state requirements.

The State of Washington respectfully requests that if this Court determines that the Connecticut statute being challenged in the instant case is unconstitutional, it clearly distinguish its earlier ruling in *Starns* so as to preserve that ruling and the right of the states to create durational residency classifications for tuition purposes.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE,* AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, the American Civil Liberties Union of Ohio, Inc. respectfully moves for leave to file a brief *amicus curiae* in the above entitled case. Counsel for appellant has not replied to movant's letter requesting consent; the appellees have granted their consent.*

* The letter of consent has been filed with the Clerk of the Court. Last week, counsel for *amicus curiae* received a request from the appellant's attorney to notify him of the type of argument *amicus* would present. Although we immediately complied with the request, *amicus* has not yet received a letter of consent. Should one be forthcoming, it will be filed with the Clerk.

The American Civil Liberties Union of Ohio, Inc. is a non-profit, non-partisan organization dedicated to the defense of civil liberties, and in particular, those constitutional liberties guaranteed in the Bill of Rights and the Fourteenth Amendment. Among the rights that the Union has defended during its fifty-plus years of existence are the right to travel, the right to an education and due process of law at the administrative level. As is demonstrated by the statute and regulations in the appendix to this brief commencing at p. 1a, Ohio presently employs standards and procedures for determining residence for tuition purposes similar to those employed by Connecticut. The Union agrees with the District Court of Connecticut that these standards and procedures violate constitutional requirements.

Because the issues before this Court in the instant case are closely related to issues which involve the residents of Ohio,[1] the *amicus curiae* respectfully prays leave to file the attached brief.

Respectfully submitted,
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February, 1973

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[1] *See Kelm v. Carlson*, No. 72-1241 (6th Cir. February 8, 1973).

IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-493

JOHN W. VLANDIS, Director of Admission,
The University of Connecticut,
Appellant,

vs.

MARGARET MARSH KLINE and
PATRICIA CATAPANO,
Appellees.

On Appeal From the United States District Court for the District of Connecticut

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

The interest of *Amicus Curiae* is set out in the Motion for Leave to File, *supra.*

THE QUESTION PRESENTED

Whether state educational institutes may discriminate between residents by imposing higher tuition rates upon newly arrived resident students than they impose on other resident students.

ARGUMENT

A Public Institution of Higher Learning Cannot Use a Durational Residency Requirement to Discriminate Among Residents When Assessing Fees.

A. *Introduction*

The court below found that it is impermissible for the University of Connecticut to adopt an irrebuttable presumption of non-residency which precludes "out of state" students from ever qualifying for resident tuition rates. *Kline v. Vlandis*, 346 F. Supp. 526 (D. Conn. 1972)[1] On appeal, the validity of not only the conclusive presumption, but of the whole non-resident tuition fee structure will be in issue.[2] Accordingly, the Court will be called upon to re-examine its affirmance without opinion of *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 905 (1971).[3]

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[1] *Accord, Kelm v. Carlson*, No. 72-1241 (6th Cir. February 8, 1973) (the Sixth Circuit adopted *Kline* as "both applicable to the case [before the court] and persuasive." id at p. 6 (slip opinion)).

[2] There are at least three contexts in which non-resident tuition causes constitutional difficulties. First, the validity of state institutions of higher learning charging "non-resident" students tuition fees greater than they charge their "residents" is subject to considerable doubt. Since the plaintiffs in this case are conceded to be residents, this problem is not posed in the context of this case. Second, the waiting period requirement that the student not only be domiciled in the state on the date of registration but also be so domiciled for one year prior to that date creates a substantial difficulty. Finally, of course, the irrebuttable presumption presented here is in all likelihood constitutionally infirm. *See generally* Note, *The Constitutionality of Non-resident Tuition*, 55 MINN. L. REV. 1139 (1970).

[3] The State of Washington in its *amicus curiae* brief suggests that this case does not present the question of the legitimacy of a one year durational residency requirement because the Connecticut statute's permanent classification is distinguishable from the type of requirement found in *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). Brief of *Amicus Curiae* State of Washington at p. 7. However, the court below did not enjoin solely the use of the irrebuttable presumption; it also enjoined from enforcement Conn. Gen. Stats. §10-329b(a)(2), as amended, a durational residency requirement. Thus, it would seem that the Court must decide whether a state can require a *resident* to wait one year before qualifying for the resident rate.

Although both the second and third proposition set forth in note 2 *supra* are presented to the Court within the framework of this case, *amicus curiae* will restrict its argument to the legality of the durational residency requirement since unquestionably *Carrington v. Rash*, 380 U.S. 89 (1965), is dispositive of the constitutionality of the conclusive presumption.

Starns involved the constitutionality of a Minnesota tuition regulation of the durational residency type. In holding the regulation permissible, the district court misapprehended this Court's opinion in *Shapiro v. Thompson,* 394 U.S. 618 (1969), and reached a decision which, as will be shown, is not reasonably supported in logic and is contrary to legal authority. *See* Note, 24 ALA. L. REV. 147, 151-52, 162 (1971).[4]

B. *Any state scheme of statutory classification of persons which impedes the fundamental right to travel can only be sustained against an equal protection challenge if it meets the "compelling state interest" test.*

Over 100 years ago, this Court recognized that imbedded within the Constitution is the right of a citizen to pass and repass through every part of the country without interruption. *The Passenger Cases,* 48 U.S. (7 How.) 282, 491-92 (1949) (Taney, C. J., dissenting).[5]

[4] It would be presumptuous of counsel to try to tell this Court why it affirmed *Starns.* However, it should be pointed out that *Starns* was affirmed without benefit of oral argument and before this Court's decision in *Dunn v. Blumstein,* 405 U.S. 330, (1972). To the extent that the Court feels that *Dunn* is not controlling, the Court should overrule *Starns.* As will be demonstrated, *Starns* is an illogical and confusing intepretation of *Shapiro* and conflicts with the current concept of the right to travel as presented in *Dunn.*

[5] The right to travel finds no explicit mention in the Constitution although it has often been suggested that it is absent because the right is so obviously elementary to a federal union. *E.g., United States v. Guest,* 383 U.S. 745, 758(1966); *see generally* Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution,* 44 N.Y.U. L. REV. 989, 990-93 (1969). The right has been attributed to the privileges and immunities clause of Article IV, §2. *Ward v. Maryland,* 79 U.S.(12 Wall) 418, 430 (1870). It has also been found in the privileges and immunities clause of the Fourteenth Amendment, *Edwards v. California,* 314 U.S. 160, 178(1941) (Douglas, J. concurring); *The Slaughter-House Cases,* 83 U.S.(16 Wall.) 36, 79(1872), the Commerce Clause, *United States v. Guest, supra* at 758-59, and within the due process clause of the Fifth Amendment. *Aptheker v. Secretary of State,* 378 U.S. 500, 505-06 (1964). *See also Shapiro v. Thompson,* 394 U.S. 618, 630n.8(1969); *United States v. Guest, supra* at 762-71 (Harlan, J., concurring in part, dissenting in part).

More recently, the right to travel was articulated by the Court in *Shapiro v. Thompson,* 394 U.S. 618 (1969), and *Dunn v. Blumstein,* 405 U.S. 303, (1972) The former decision held that state residence requirements which prohibited welfare payments to residents who had not lived in the state for a minimum of one year created a classification which denied them the equal protection of the laws. 394 U.S. at 627. The latter decision struck down as unconstitutional a durational residency requirement which created two classes of residents for voting purposes; residents who had lived in the state for at least a year and could vote, and those who were residents less than a year and could not. 405 U.S. at 334. Both decisions underscore the Court's recognition of the right to travel as an independent and fundamental constitutional guarantee. 394 U.S. at 629; 405 U.S. at 338-39.

State statutes infringing upon a fundamental constitutional right will be scrutinized strictly. *E.g., Harper v. Virginia Board of Elections,* 383 U.S. 663, 669-70 (1966). When fundamental rights are involved even a rational relationship between the particular statute and a permissible legislative goal of the state will not suffice to uphold the legislation. Instead, the presumption of constitutionality normally accorded state enactments is reversed, R. B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection,* 61 MICH. L. REV. 645, 666-67 (1963), and the law will stand only if the state can demonstrate a *substantial* and *compelling* governmental interest for imposing the restriction in question. *Dunn v. Blumstein,* 405 U.S. at 335; *Shapiro v. Thompson,* 394 U.S. at 634. The right to travel having been repeatedly recognized as a fundamental constitutional right, *Shapiro, Dunn* and the compelling state interest test must control this case.

While this Court had occasion to affirm a decision which rejected the application of the compelling state interest test to a regulation imposing a one-year durational residency requirement for tuition purposes, *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd,* 401 U.S. 985(1971), the Court's recent opinion in *Dunn* seems to place the viability of *Starns* in considerable doubt. In *Starns,* the district court spurned the compelling state interest test and opted for the rational basis test to examine the validity of a durational residency requirement for tuition purposes. The court rationalized its choice of which equal protection standard to use by holding that in *Shapiro* this Court found, "based on weighty evidence", that the welfare regulations had as one of their specific purposes the exclusion of the poor from the state. According to Judge Lord writing for the district court panel, there were no facts before the court disclosing that the waiting period for resident tuition purposes had as a *specific objective* excluding out of state students nor was there a basis to conclude that the operation of the one year waiting period had an unconstitutional "chilling effect" on the constitutional right to travel. 326 F. Supp. at 237-38. Thus, the district court avoided the clear command of *Shapiro* by finding that the durational residency requirement for tuition did not abridge any fundamental constitutional right.

This is the same argument attempted by the State of Tennessee in *Dunn* and rejected by the Court as untenable. 405 U.S. at 339-42. Under *Dunn,* actual proof of whether the regulations deter students from entering the state is unnecessary. Indeed, this Court found that the view that *Shapiro* requires a showing of actual deterrance represents a fundamental misunderstanding of the law and concluded that:

> "*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In *Shapiro*, we explicitly stated that the compelling state interest test would be triggered by 'any classification which serves to *penalize* the exercise of that right (to travel) . . .' *id.* at 634." *Dunn v. Blumstein*, 405 U.S. at 339-40.

Without exception durational residence laws impermissibly hinder and penalize the right to travel by imposing their restrictions only on those who exercise their fundamental right to travel and change residence. *id.* at 342. If a residence requirement for voting is a penalty on travel, then it is difficult to see how such a requirement conditioning eligibility for in-state tuition could be any less of a penalty.

In sum, the University of Connecticut cannot bootstrap its way by using *Starns*, a case based on a postulate which this Court has disavowed. The University must support its non-resident student fee by showing the state has a compelling state interest or it cannot support it at all. "Absent a compelling state interest, a State may not burden the right to travel in this way." 405 U.S. at 342.

C. *Durational residence requirements for Tuition purposes do not further any substantial state interest.*

Two purposes have been advanced as justification for the tuition waiting period: cost equalization and proof of domiciliary intent. Comment, *The Constitutionality of Nonresident Tuition*, 55 MINN. L. REV. 1139, 1156(1971). Additionally, the tuition waiting period may have behind it the explicit purpose of deterring migration into the

state, although, since this Court rejected such a purpose as impermissible in *Shapiro*, 394 U.S. at 629, it will rarely, if ever, be articulated.[6]

The cost equalization rationale was fully articulated in *Kirk v. Board of Regents*, 273 Cal.App.2d 430, 78 Cal. Rptr. 260 (Dist. Ct. App. 1969). The California court believed that "[t]he higher tuition charged nonresident students tends to distribute more evenly the cost of operating and supporting the University of California between residents and nonresidents attending the university." *id* at 444; 78 Cal. Rptr. at 269.

To begin with, it is hard to accept this rationale even under the rational basis test since this conclusion confuses the issue: Although it may be proper to distinguish between resident and non-resident students in order to equalize cost, it is highly improper to have two classes of residents paying different rates based upon their past tax contribution. *Shapiro* expressly prohibits a state from apportioning "*all* benefits and services according to the past tax contributions of its citizens." 394 U.S. at 632-33. Emphasis added.

Additionally, the cost equalization theory fails because it is based on a faulty assumption. The "old" citizens of a state do not contribute the bulk of the financial needs of higher education through payment of their state taxes. Although state tax support continues to rise in actual dollar amount, it is steadily decreasing

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[6] There are indications that deterrence of out of state students is one of the specific reasons for the higher tuition rates charged out of state students. A recent law review article points out that, according to the *New York Times*, August 31, 1969, p. 32, Cols. 1, 2, universities are taking steps to limit the number of enrollees from outside their state borders. One of the measures taken is increasing non-resident tuition. Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 152-53 (1971).

as a percentage of the total financing of higher education. N.P. Auburn, *Tax Support*, 30 PROCEEDINGS, ACADEMY OF POLITICAL SCIENCE 94, 95(1970). Today, while allocations of state monies cover a vital part of the institutional budget, they constitute an average of only about 27% of the operating budget for educational purposes. By 1980, it is expected to fall to 22% as more and more of the burden of higher education is assumed by the students and by the federal government. H. R. Bowen, *Financial Needs of the Campus*, 30 PROCEEDINGS, ACADEMY OF POLITICAL SCIENCE 75, 92 (1970).[7] If the historical pattern continues, students will contribute almost one-fourth of the cost of their education, the state and federal government will each account for approximately 25% of the cost and the remainder will come from non-public sources. Hence, it may be fair to state that by charging higher out-of-state tuition rates, the state is not asking the "out of state" resident to equalize the cost but is asking him to help finance the education of the "in-state" resident student. As the percentage of student financing grows, the truer this becomes.

The other purpose—proof of domiciliary intent—was also repudiated by this Court in *Dunn*. 405 U.S. at 345-54. The Court recognized that the waiting period was no more than an irrebutable presumption that could not be disputed regardless of the amount of objective indicia of true residency one might present to prove that he is a bona fide resident. The Court had previously considered and rejected a similar kind of irrebutable presumption in *Carrington v. Rash*, 380 U.S. 89, 95(1965).

The state may have a legitimate concern in making sure that the people to whom it grants resident tuition

[7] A table demonstrating the sources of income to higher education is reproduced in the appendix to this brief at p. 4a.

status are bona fide residents and a durational residence requirement may, in a crude way, accomplish that purpose.

> "But it also excludes many residents. Given the state's legitimate purpose and the individual interests which are affected, the classification is all too imprecise." 92 S.Ct. at 1007.

This is especially true since, as the *Dunn* Court noted, it is not very difficult for a state to determine on an individualized basis whether one recently arrived in the community is in fact a resident. *id.* at 348. For instance, the state could easily determine whether the new arrival has obtained a dwelling, car registration, driver's license or voting registration. *See, id.* at 348. All demonstrate an intention to stay indefinitely in a place.

CONCLUSION

For the reasons set forth herein, the decision below should be affirmed.

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OHIO REVISED CODE §3345.01

§3345.01 Tuition may be charged non-residents.

The board of trustees of a state university and the board of trustees of the medical college of Ohio at Toledo may charge reasonable tuition for the attendance of pupils who are nonresidents of Ohio.

REGULATIONS OF THE STATE BOARD OF REGENTS GOVERNING NON-RESIDENT TUITION

D. *Ohio Resident*

In determining whether or not an enrolled student is an Ohio resident for purposes of the appropriation subsidy, each state-assisted institution shall make a determination of fact in accordance with these standards:

1. A dependent student shall be considered to be a resident of Ohio if his or her parents or legal guardian have resided in Ohio for 12 consecutive months or more immediately preceding enrollment, or if his or her parents reside in Ohio at the time of enrollment and at least one of the parents is gainfully employed on a full-time basis in Ohio.
2. A student shall be considered to be an Ohio resident regardless of the place of residence of the parents or legal guardian at the time of enrollment if the student resides in Ohio and has resided in the state for 12 consecutive months or more immediately preceding enrollment and if the student presents satisfactory evidence that the parents or legal guardian have not contributed to his or her support during the preceding 12 months and do not claim him or her as a dependent for federal government income tax purposes.
3. A student shall be considered to be an Ohio resident regardless of the place of residence of

the parents or legal guardian at the time of enrollment if the student is gainfully employed on a full-time basis and resides in Ohio, and is pursuing a part-time program of instruction and if there is reason to believe that the student did not enter Ohio primarily for the purpose of enrolling in an Ohio institution of higher education.

4. The residency status of a married student shall be determined without regard to the residency status of the student's spouse.
5. A person in military service or the dependent children of a person in military service shall be considered to be a resident of Ohio during the period of time when that person is on active duty status in Ohio and has established a residence in Ohio.
6. A person who enters upon active duty status in the military service as a resident of Ohio and the dependent children of such a person shall be considered to be residents of Ohio if they provide proof of continued domicile in Ohio and of continued eligibility to vote in Ohio.
7. A student classified as a resident of Ohio whose parents or legal guardian move their residence to another state shall be considered to be a resident of Ohio until completion of the degree program in which the student is currently enrolled.
8. A student who at the time of enrollment enters the State of Ohio from another state for the primary purpose of enrolling in an Ohio institution of higher education shall be considered to be a non-resident student, and shall continue to be so considered during the period of continuous enrollment as a full-time student in an Ohio institution of higher education.

9. An alien student admitted to the United States on a student visa or other temporary visa shall be considered to be a non-resident student. An alien holding an immigrant visa may establish Ohio residency in the same manner as a citizen of the United States.

10. A student classified as a non-resident student may appeal the classification to an appropriate officer or administrative panel duly constituted by an institution of higher education and may be reclassified as a resident of Ohio if:

    a. the dependent student presents conclusive evidence that his or her parents or legal guardian have established a residence in Ohio and at least one of the parents is gainfully employed on a full-time basis in Ohio;

    b. the student, in addition to demonstrating financial independence from parents, presents clear and convincing evidence of exceptional circumstances justifying a change in classification because of having established a separate residence in Ohio for 12 months or more preceding the request for reclassification and because of having made a definite commitment to enter into gainful employment in Ohio upon completion of a degree program within the ensuing 12 months.

Table 1

Estimates and Projections of the Income to Higher Education for Operating and Capital Purposes, 1966-1967 to 1980-1981 (in billions of dollars)

	Actual[a] *1966-1967*	*Estimated*[b] *1968-1969*	*Projected*[c] *1980-1981*
Student tuition and fees	3.1 (18%)	3.6 (18%)	7.0 (18%)
Federal government	3.5 (21%)	4.8 (24%)	10.9 (28%)
State and local government	4.6 (27%)	5.2 (25%)	8.6 (22%)
Endowment earnings	.4 (2%)	.4 (2%)	.7 (2%)
Private gifts and grants	1.5 (9%)	1.7 (8%)	2.7 (7%)
Income of auxiliary enterprises	2.2 (13%)	2.4 (12%)	3.5 (9%)
Other (including loans)	1.6 (10%)	2.3 (11%)	5.6 (14%)
Total	16.9 (100%)	20.4 (100%)	39.0 (100%)

[a] U.S. Office of Education, *Financial Statistics of Institutions of Higher Education*, 1966-67.

[b] Division of Research, Council for Financial Aid to Education.

[c] In 1968-1969 prices.

IN THE

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Appellant,

v.

MARGARET MARSH KLINE and
PATRICIA CATAPANO,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT

APPELLEES' BRIEF

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ON APPEAL FROM THE UNITED STATES
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OF CONNECTICUT

APPELLEES' BRIEF

QUESTION PRESENTED

Whether the State of Connecticut may permanently deny resident student status to one of its bona fide residents under a system of tuition classification at its institutions of higher learning which imposes a permanent irrebuttable presumption of non-residency based wholly on recent travel.

STATEMENT OF THE CASE

The appellee, Margaret Marsh Kline, was found by the lower Court to be a bona fide resident of the State of Connecticut (App.Jurisdictional Statement 5-6a).* She is an undergraduate student at the University of Connecticut. By state statute she is permanently classified as an out-of-state student. (App.Jur. 3a). The situation of the appellee, Patricia Catapano, is in all respects similar except that she is a graduate student at the University of Connecticut. Both are over twenty-one years of age. Both appellees are proceeding *in forma pauperis*.[1] (R. 12). As a consequence, each was required to pay twice the in-state tuition plus and additional $400.00 annual out-of-state "fee." (App.Jur. 3a).

In May of 1971, Mrs. Kline, while attending college in California as an in-state student, became engaged to Peter Kline, a life-long Connecticut resident. (App.Jur. 2a). Because the Klines wished to reside in Connecticut after their marriage, Mrs. Kline applied to the University of Connecticut from California and was accepted in late May, 1971. (A. 21a). At that time, she was informed by

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*Hereinafter cited (App.Jur.).

[1] The appellees' application for a temporary injunction against enforcement of the statute and the regulations thereunder setting up the fee differentials was denied after the court was advised that student loans or grants sufficient to meet the added charges for the Spring semester had been made available to them. See Ruling on Application for a Preliminary Injunction, January 4, 1972. (R. 13)

the University that she would be considered an in-state student at the University of Connecticut. (A. 21a).

In June, 1971, the appellee and Peter Kline intermarried in California and soon after took up residence in Storrs, Connecticut, where they have established a permanent home. (App.Jur. 2a). Mrs. Kline has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. (App.Jur. 2a). The Court below found that ". . . before the commencement of the Spring semester in 1972 [Mrs. Kline] was a bona fide resident of the State of Connecticut." (App.Jur. 5a).

In July of 1971, the tuition statute in question (Connecticut General Statutes, Section 10-329(b)) went into effect which defined a married out-of-state student as one "whose legal address at the time of his application for admission to such a unit [of higher education] was outside of Connecticut."[2] (A. 11a). Accordingly, the appellant, Director of Admissions of the University of Connecticut, irreversibly classified Mrs. Kline as an out-of-state student. (App.Jur. 3a). Mrs. Kline protested and the appellant replied that under the statute, "It becomes quite obvious that you fall into the category of an out-of-state student." (A. 6a).

As a consequence, Mrs. Kline was required to pay $150.00 out-of-state tuition for the first semester and a $200.00 non-resident fee, as compared with no tuition being paid by a student classified as a Connecticut resident. In addition, she was required to pay $200.00 per semester as a "non-resident fee." Upon registration

[2]Involved here also are "regulations of the University which have followed the relevant portions of the statute *in haec verba*." *Kline v. Vlandis*, 346 F. Supp. 526, 527 n.1 (A. 7a).

for the second semester, she was required to pay $425.00 tuition plus another $200.00 non-resident fee while a student classified as a Connecticut resident paid $175.00 tuition. Had Mrs. Kline applied from Connecticut rather than California, she would have been considered a Connecticut resident.

The second appellee, Patricia Catapano, moved her residence to Connecticut from Ohio in August, 1971. She has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. She is an unmarried graduate student at the same University. The Court found that ". . . before the Spring semester in 1972 [Miss Catapano] was a bona fide resident of the State of Connecticut." (App.Jur. 2a, 5-6a).

The appellant irreversibly classified her as an out-of-state student pursuant to subsection (a)(2) of Section 10-329(b) of the Connecticut General Statutes which defines a single out-of-state student as one "whose legal address for any part of the one year period immediately prior to his application . . . was outside of Connecticut." (A. 11a).

As a consequence, Miss Catapano was required to pay $150.00 tuition and a $200.00 non-resident fee for the first semester and $425.00 tuition plus an additional $200.00 non-resident fee for the second semester. (App. Jur. 3a).

Once the appellees were so classified their status was irreversible since the statute commands that:

> The status of a student as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section shall be his status for the

entire period of his attendance at such constituent unit. (A. 11a).

The appellant's Brief on the Merits fall considerably short of reflecting all the pertinent facts with respect to the appellees' voter registration. The appellant states that neither appellee was registered to vote at the time of trial on January 7, 1972. (Appellant's Brief on the Merits, at 4). This is literally true. But, he fails to state that both appellees became registered voters in the Town of Mansfield on the afternoon of January 7, having completed their six month residency requirement, Connecticut General Statutes, Section 9-12.[3] This fact was brought to the trial court's attention in plaintiffs' brief dated January 20, 1972, and adopted by the court in its opinion as a finding of fact which it issued on June 14, 1972.

A Three-Judge District Court was convened on November 10, 1971, and oral argument was heard on January 7, 1972. On June 14, 1972,[4] six months later, the District Court filed its Memorandum of Decision unanimously holding that the Connecticut out-of-state tuition law violated the Fourteenth Amendment to the United States Constitution and entered its Order and Judgment declaring the classification provision of the statute unconstitutional and enjoining the defendant from enforcing

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[3]Since held unconstitutional in *Nicholls v. Schaffer*, 344 F. Supp. 238 (D. Conn., 1972).

[4]This six month delay was partially explained by the District Court as follows: "Shortly after this case was heard, defense counsel informed the Court that the legislature, then in session, was considering a bill relating to tuition payments by non-residents which would repeal the particular portions of the statute which are the target of constitutional attack here. Although such a bill was passed [House No. 5302], . . . the Governor of Connecticut vetoed it on May 10, 1972." (Opinion, n.3).

subsections (a)(2), (a)(3), and (a)(5) of Section 10-329(b) of the Connecticut General Statutes.

On July 11, 1972, the appellant moved that the District Court stay the permanent injunction pending appeal to the Supreme Court, which motion was denied. A similar motion addressed to Mr. Justice Marshall was denied by him on August 3, 1972.

In its opinion (n.4) the District Court noted that the statute in question was "... so arbitrary and unreasonable by its own terms as to be unconstitutional ..." (App.Jur. 5a, n.4) and stated:

> Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-residents than on resident students, the state may not classify as 'out of state students' those who do not belong in that class. (App.Jur. 4a).

SUMMARY OF ARGUMENT

1. *Connecticut's Irrebuttable Presumption of Non-Residency Violates the Equal Protection Clause of the Fourteenth Amendment.*

   a. The statute must be judged by the compelling state interest test.

The compelling state interest test is required because the statute in question penalizes and deters the fundamental right to travel. The testimony of the appellees demonstrates the actual deterrent effect of the statute. Neither would have travelled to Connecticut to become residents and attend the University if they were aware of the permanent nature of the classification. The Court below found them to be bona fide residents of Connecticut, *Kline v. Vlandis*, 346 F. Supp. 526 (D.Conn.,

1972) even though both were classified as "out-of-state" residents by the University. Consequently, they were required to pay $800 more per year than other bona residents. This court has held in *Dunn v. Blumstein*, 405 U.S. 330 (1972) that a state cannot impose penalties on those who exercise their fundamental Constitutional rights to travel. Here the statute deters the right to travel, penalizes recent travel, and absolutely bars contravention of the out-of-state classification. Thus, the Connecticut statute impinges upon the fundamental right to travel and therefore requires that the compelling state interest test be used for strict equal protection review.

b. The State of Connecticut's objectives of partial cost equalization based upon past tax contributions and administrative certainty of a college student's domiciliary intent do not satisfy compelling state interests.

This Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969) made it clear that objectives based upon past tax contributions were constitutionally impermissible.

Connecticut here also argues that its second objective is to insure with administrative certainty the domiciliary intent of its college students. The state has a legitimate interest to protect itself from abuse of resident status for tuition purposes, but must do so in a way not to interfere with or penalize the constitutional right to travel. By the absolute classification the State of Connecticut has chosen a course of greater interference with the right to travel. The state not only can, but is now using less drastic means to accomplish its purpose. For these reasons the opinion of the District Court should be affirmed.

2. *Connecticut's Irrebuttable Presumption of Non-Residency Even Violates Traditional Equal Protection Standards.*

Where traditional review is applied, the Court must find some rational connection between the legitimate state policy objective and the means selected to achieve that objective. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Nevertheless, the rational connection test still requires the invalidation of Connecticut's permanent presumption of non-residency for tuition purposes. There is no rational basis for equalizing the cost of public higher education between residents and non-residents by permanently imposing non-resident's status on new bona fide residents. It is logically impossible for bona fide Connecticut residents who attend college in Connecticut to be out-of-state students. Nor is there a rational basis for determining bona fides of residence by imposing non-resident status on new arrivals because their college application was filed from a non-Connecticut residence. Rational criteria for determining bona fide residence not only exist, but are now in use by the State. There is no reason for Connecticut to exclude new residents from resident tuition status solely because they are recent arrivals. Such a purpose is constitutionally impermissible as a penalty on the right to free travel. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972). In short, Connecticut's permanent presumption of non-residency is designed to accomplish nothing with respect to equalizing the cost of public higher education or determining bona fide residence.

3. *The Statutory Classification of Appellees as Non-Resident Students Violates The Standards of Due Process Required by the Fourteenth Amendment.*

Connecticut utilizes a statutory irrebuttable presumption of non-residency for students who resided out-of-state at the time they applied to a state university. Appellees, who were both found to be bona fide residents of Connecticut by the lower court, were classified as permanent non-resident out-of-state students because of their non-residency at the time of application. Appellee Kline married a life-long Connecticut resident and moved to her husband's home state after her marriage.

The classification of Connecticut residents as non-resident out-of-state students deprives appellees of the three important interests, property, interstate travel and a state entitlement of education. The procedure utilized to grant or deny each of these important interests must meet the standards of due process required by the Fourteenth Amendment.

The out-of-state student classification subjected appellees to an additional tuition charge. The importance of property to the individual and the necessity for due process before its deprivation is a basic component required by the due process clause. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Heiner v. Donnan*, 285 U.S. 312 (1932); and *Coe v. Armous Fertilizer*, 237 U.S. 413 (1915).

The irrebuttable presumption of non-residency infringed on appellees' fundamental constitutional right to interstate travel. *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Dunn v. Blumstein*, 405 U.S. 330 (1972).

State provided education is at the very least, an important interest whose deprivation must be accompanied by due process. *Brown v. Board of Education*, 347 U.S. 483 (1954); *McCollum v. Board of Education*, 333 U.S. 203 (1948).

Without the initiation of this litigation, appellees would have been forced to terminate their education in Connecticut because of the irrebuttable presumption of non-residency. The granting or denying of a state provided entitlement such as education must be accompanied by due process. *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The utilization of an irrebuttable presumption of non-residency prevents a meaningful inquiry or a hearing into the fundamental element essential to the decision to grant or deny residential student status. A classification procedure which utilizes such an irrebuttable presumption violates the standard of due process required by the Fourteenth Amendment. *Heiner v. Donnan*, 285 U.S. 312 (1932); *Bell v. Burson*, 402 U.S. 535 (1971); and *Stanley v. Illinois*, 405 U.S. 645 (1972).

The irrebuttable presumption in Connecticut General Statutes, Section 10-329(b) violates the Fourteenth Amendment in denying the important interests of property, interstate travel, and a state provided entitlement without due process of law.

ARGUMENT

I.

CONNECTICUT'S PERMANENT, IRREBUTTABLE CLASSIFICATION OF A BONA FIDE CONNECTICUT RESIDENT AS A NON-RESIDENT FOR THE PURPOSE OF REQUIRING HIGHER TUITION PAYMENTS PENALIZES THE APPELLEES FOR EXERCISING THEIR FUNDAMENTAL CONSTITUTIONAL RIGHT TO TRAVEL IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

INTRODUCTION

At the outset, it is important to note what is not at issue in this case. The appellees here do not challenge the right of the State of Connecticut to restrict in-state tuition status to bona-fide Connecticut residents. Instead they challenge that statutory provision that will never allow them to qualify as bona fide residents. The court below specifically found that "before the commencement of the Spring Semester for 1972 each of the plaintiffs was a bona-fide resident of the State of Connecticut. . ."[5]

But, in addition to this, the Connecticut scheme required an additional residency period, depending upon whether the person was married or single, in order to be granted in-state tuition status.[6] It provided that Mrs.

[5] *Kline v. Vlandis*. 346 F. Supp. 526, 529 (D. Conn, 1972) (Three-Judge Court) (App., at 5a-6a).

[6] Section 10-329 (b) of the Connecticut General Statutes (as amended by Connecticut Public Acts (1971) No. 5 §126 (June Session) states that a married student shall be classified as "out-of-state" if his "legal address at the time of his application . . . was outside of Connecticut."

Kline must have been a resident of Connecticut *before she filed her application* for admission to the University of Connecticut[7] and Miss Catapano must have been a resident in the state for one year *before she filed her application*. It is this additional durational residence requirement which the appellees challenge. This point is undisputed. In his brief, the appellant states: "In this connection, it should be noted that an individual may *delay his studies* and establish in-state residency for a future application."[8] (emphasis added). That this is the *only way* to satisfy this requirement is also undisputed since the statute further commands that once a student's resident status is established, he is plainly and explicitly barred from obtaining any change in that status.[9] *See, Dunn v. Blumstein*, 405 U.S. 330 (1972).

With respect to single students, the statute provides that a student will be classified as out-of-state if his legal address:

> for any part of the one-year period immediately prior to his application . . . was outside of Connecticut. (App., at 11a).

[7]The duration for married students here being at least one semester—that period of time between application, acceptance and actual matriculation. Conn. Gen. Stat. 10-329 (b) (App., at 11a).

[8]Appellant's Brief on the Merits, at 5.

[9]"The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education . . . shall be his status for the entire period of his attendance at such constituent unit." Conn. Gen. Stat. §10-329(b) (App., at 11a).

A. The Right To Travel Interstate Is a Fundamental Constitutional Right.

The right to travel has been established by this Court as a fundamental constitutional right. In the early *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), Chief Justice Taney said:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States, as members of the same common unity must have the right to pass and repass through every part of it without interruption, as freely as in our own states.
> *Id.*, at 492 (Taney, C.J., dissenting).

In *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), this Court struck down as unconstitutional the imposition of a $1.00 capitation tax on railroad or stage coach passengers as an abridgement on such persons' fundamental right to pass freely from state to state.[10]

Recently, in *United States v. Guest*, 383 U.S. 745 (1966), Mr. Justice Stewart emphasized that the source of the right in question need not be ascribed to any particular constitutional provision.

> [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any

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[10] *See also, Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 77 (1873); *Williams v. Fears*, 179 U.S. 270 (1900); *Edwards v. California*, 314 U.S. 160 (1941).

> event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.
> *Id.*, at 758 (citations omitted) (footnotes omitted).

Three years after *Guest*, the Court held in *Shapiro v. Thompson*, 394 U.S. 618 (1969), that absent a compelling state interest, a state may not impose a one-year durational residency requirement as a condition of receiving public welfare benefits which impinges upon the recipient's constitutional right to travel freely from state to state.[11]

Last Term this Court in *Dunn v. Blumstein*, 405 U.S. 330 (1972), held that Tennessee's durational residency requirement as a prerequisite for voter registration was unconstitutional. Mr. Justice Marshall, speaking for the majority, clearly enunciated two distinct fundamental constitutional rights—the right to vote and the right to travel. Both, he concluded, must be analyzed under the "strict scrutiny" test of the Equal Protection Clause of the Fourteenth Amendment.[12]

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[11] In his concurring opinion in Shapiro, *supra*, Mr. Justice Stewart emphasized the continuing evolution of the right to travel from deeply ingrained constitutional theory:

> This Constitutional right . . . is *not* a mere conditional liberty subject to regulations and control under conventional due process of Equal Protection standards. 394 U.S., at 642-43 (Stewart J., concurring) (citation omitted) (footnote omitted).

[12] The fact that the lower court in the case at bar chose not to base its decision upon the infringement of the appellees' constitutional right to travel is of no jurisdictional consequence. The prevailing party in the lower court may assert in the appellate court any ground to support his judgment regardless of the trial court's finding. *Compare, Langnes v. Green*, 282 U.S. 531, 538 (1931). *With Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 567-68 (1931). In the case at bar appellees do not attack

The underpinnings of the constitutional right to travel discussed in both *Shapiro* and *Dunn* are fully applicable to the instant case. The liberty to migrate, to live where one chooses, and, after establishing a bona-fide residence, to enjoy the same benefits as other bona-fide residents is most fundamental to our individual concepts of freedom. It having been established by this Court that "the right to travel is 'an *unconditional* personal right', whose exercise may not be conditioned," *Dunn, supra*, 405 U.S., at 341. (emphasis supplied); *Shapiro, supra*, 394 U.S., at 643 (Stewart J., concurring); *Oregon v. Mitchell*, 400 U.S. 112, 292 (1970) (opinion of Mr. Justice Stewart, in which Burger, C.J., and Blackmun, J., joined), any penalty or abridgment of the appellees' fundamental right to travel can be sustained only if the State of Connecticut can demonstrate a compelling state interest.

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in any respect the decree entered below. They "merely assert additional grounds why the decree should be affirmed." *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435-36 (1924). Since the constitutional right asserted herein was fully argued below, the consideration of the claim of an interference with the right to travel interstate is appropriate by this Court. *Bondholders Committee v. Commissioner*, 315 U.S. 189, 192 n.2 (1942); *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970); *Wyman v. James*, 400 U.S. 309, 345 n. 7 (1971), (Marshall, J., dissenting); H. Hart & H. Wechsler, *The Federal Court and the Federal System*, 1394 (1953). *See also, Jaffke v. Dunham*, 352 U.S. 280 (1957).

B. Connecticut's Permanent Irrebuttable Classification of Bona-Fide Residents as Non-Residents for Tuition Purposes Penalizes and Deters the Appellees' Right To Travel and Therefore Mandates Strict Equal Protection Scrutiny.

1. *Connecticut's permanent irrebuttable presumption of non-residency for tuition purposes penalizes and deters the appellees' right to travel and thus triggers strict equal protection review.*

Contrary to the argument of the State of Tennessee in *Dunn v. Blumstein,* 405 U.S. 330 (1972), and the position taken by the appellant in the case at bar, the right to travel interstate need not be actually deterred in order to invoke the more stringent standard of review under The Equal Protection Clause of the Fourteenth Amendment. The appellant's contention that the decision in *Shapiro v. Thompson,* 394 U.S. 618 (1969), was premised upon an actual finding of deterrence to interstate movement "represents a fundamental misunderstanding of the law." *Dunn v. Blumstein,* 405 U.S. 330, 339 (1972) (footnote omitted). In so ruling, this Court in *Dunn, supra,* reasoned as follows:

> Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. 405 U.S. at 339-40 (footnote omitted).

Furthermore, the Court in *Dunn* in reliance upon *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969), held that quite apart from any purpose to deter, "the compelling State interest test would be triggered by 'any classification which served to *penalize* the exercise of that

right [to travel] . . .' " *Dunn, supra,* 405 U.S. at 340 (emphasis supplied) (citations omitted).

In the instant case appellees maintain that the permanent irrebuttable classification of Conn. Gen. Stat. §10-329(b) both deters and penalizes their fundamental right to travel. With respect to deterrence, both appellees tendered uncontroverted testimony that had they known of the fact that they would have been permanently classified as "out-of-state" students pursuant to Conn. Gen. Stat. §10-329(b), they would not have traveled to Connecticut to become bona-fide residents and attend the University of Connecticut. *See,* testimony of appellee Kline (App., at 21a-22a, Tr., at 28-29); testimony of appellee Catapano (App., at 23a, Tr., at 43-44). Indeed, appellee Kline testified that she "would have remained in California" to complete her education. (App., at 22a, Tr., at 28).[13]

[13] Statistical studies support the premise that the migration of students in colleges and universities is steadily decreasing. The following table indicates that the national percentage of student migration declined from 18.2% in 1963 to 16.8% in 1968.

TABLE 1

Number of College Migrants, Public and Private Institutions, United States, 1938-68

	All Migrants		*Migrants in Public Institutions*		*Migrants in Private Institutions*	
Year	*Number*	*Percent**	*Number*	*Percent***	*Number*	*Percent****
1968	1,104,632	16.8	425,755	9.2	678,877	34.8
1963	750,690	18.2	256,396	10.0	494,294	31.7
1958	528,663	18.5	168,530	10.1	360,133	29.6
1949	496,921	20.0	151,302	12.0	345,619	28.1
1938	236,444	19.4	n.a.	n.a.	n.a.	n.a.

* Percentage based on total enrollment in all institutions.
** Percentage based on total enrollment in public institutions.
*** Percentage based on total enrollment in private institutions.

Since both appellees applied to the University of Connecticut from without the State, and having been accepted moved into the State to establish bona-fide residence and attend the University, the operation of Conn. Gen. Stat. Section 10-329(b) directly penalizes them for recent travel. While the Court below found both appellees to be bona-fide residents of the State of Connecticut, *Kline v. Vlandis*, 346 F. Supp. 526, 529 (D. Conn., 1972), both were nevertheless classified as "out-of-state" students pursuant to the statute and were required to pay $800.00 more per year than the other bona-fide residents classified as "in-state" students. *See*, App., at 19a, Defendant's Exhibit 1. Speaking of similar treatment of prospective voters in Tennessee, Mr. Justice Marshall emphasized in *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972):

Steahr, and Schmid, *College Student Migration in the United States*, Journal of Higher Education, Vol. XLIII, No. 6, Table 1, 441, 445 (June, 1972).

The study further indicates that the State of Connecticut ranked 46th nationally from 1949 to 1968 in terms of net in-migration of college students to all institutions of higher learning. *Id.*, Table 2, at 448-49. In fact, in 1968 Connecticut had a net out-migration total of 22,081 college students. *Id.*

In another statistical study compiled by the United States Department of Health, Education, and Welfare, entitled, *Analytic Report on Residence and Migration of College Students* (1968), the observation is made at 2 that:

> Despite a general feeling that mobility in our society is increasing, between 1963 and 1968 the percentage of students who went outside their home states to attend colleges or universities actually declined by two percentage points.

The HEW Study concludes significantly, that "higher out-of-State tuition fees tend to discourage migration across State lines." *Id.*

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied' . . . (citations omitted) (footnote omitted).

This Court has consistently struck down the imposition of other monetary penalties where the statute sought to penalize persons solely on the basis of recent travel.[14] Hence, even where travel is not absolutely prohibited, the statute is invalid in the absence of a compelling state interest. *See, Dunn v. Blumstein,* 405 U.S. 330, 342 (1972).

The right to travel interstate is not a meaningless right of mere movement. It necessarily includes the option of establishing a new residence wherever one chooses throughout this country and the opportunity to partake in both the burdens and benefits of citizenship. As discussed above the Connecticut statute in question not only serves as a deterrent to travel but also imposes a severe monetary penalty upon new bona-fide residents solely upon their recent exercise of this fundamental Constitutional right. Hence, the impingement created by the permanent, irrebuttable classification of Conn. Gen. Stat., Section 10-329(b) triggers the more demanding test of the Equal Protection Clause.

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[14] *See, Crandall v. Nevada,* 73 U.S. (6 Wall.) 35 (1868) (imposition of $1.00 capitation tax on railroad or stage coach passenger); *Harper v. Virginia Board of Electors,* 383 U.S. 663, 668 (1966), (imposition of a $1.50 poll tax); *Mullaney v. Anderson,* 342 U.S. 415, 416 (1952) (a $50.00 non-resident fishing license fee); *Toomer v. Witsell,* 334 U.S. 385, 395 (1948) (a $1.50 marine hospital fee). *See also, Dunn v. Blumstein,* 405 U.S. 330, 340 n.9 (1972).

2. *Since the fundamental right to travel is penalized by the operation of Conn. Gen. Stat., Section 10-329(b), the statute must be analyzed under the compelling state interest test.*

It is now axiomatic that before fundamental constitutional rights may be impinged upon, the State must demonstrate a compelling state interest. This strict standard under the Fourteenth Amendment applies not only to enumerate[15] and generic[16] rights, but also to those fundamental rights to which this Court has ascribed no particular source. Recently this Court has held that a woman's right to terminate her pregnancy stems directly from her right to personal privacy, a right deemed fundamental regardless of its source. *Roe v. Wade*, ___ U.S. ____ (1973) (41 U.S.L.W. 4213, 4225-26).[17]

The effect of Conn. Gen. Stat., Section 10-329(b) is to absolutely bar persons, who are considered bona-fide residents in the state for all other purposes, from becoming residents for tuition purposes. This absolute proscription of resident status for tuition purposes penalizes a new resident who is also a student, for his

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[15] *See*, e.g., *Near v. Minnesota*, 283 U.S. 697 (1913) (freedom of press).

[16] *See*, e.g., *NAACP v. Alabama*, 357 U.S. 449, 463 (1958), (freedom of association).

[17] In so holding, Mr. Justice Blackmun, writing for the majority, stated at 4225:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

entire stay at an institution of higher learning in Connecticut by subjecting him to higher fees. Furthermore, the irrebuttable statutory classification acutely penalizes those bona-fide Connecticut residents who have recently traveled from outside of the State.[18]

This arbitrary and invidious discrimination penalizes only the newly arrived Connecticut resident by denying him any opportunity to rebut the presumption of non-resident status under any set of circumstances. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court explicitly rejected the traditional "rational relationship" standard under equal protection:

> At the outset, we reject appellant's argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. [citations omitted]. The wating-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.
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> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

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[18]It is now clear that the concept of travel includes the "freedom to *enter* and *abide* in any State in the Union." Mitchell, *supra*, 400 U.S., at 285 (opinion of Stewart, J., with whom Burger, C.J., and Blackmun, J., joined concurring). Guest, *supra*, 383 U.S., at 757-60; *Truax v. Raich*, 239 U.S. 33, 39 (1915); Dunn, *supra*, 405 U.S., at 338.

While this Court in *Dunn v. Blumstein*, 405 U.S. 330 (1972) adopted the more stringent standard for equal protection review enunciated in *Shapiro*, the Court was more explicit in attempting to further clarify the meaning of the standard when it stated at 343:

> It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," NAACP v. Button, 371 U.S. 415, 438, 9 L Ed 405, 421, 83 S Ct 328 (1963); United States v. Robel, 389 US 258, 265, 19 L Ed 2d 508, 514, 88 S Ct 419 (1967), and must be "tailored" to serve their legitimate objectives. Shapiro v. Thompson, supra, 394 US at 631, 22 L Ed 2d at 613. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." Shelton v. Tucker, 364 US 479, 488, 5 L Ed 2d 231, 237, 81 S Ct 247 (1960).

Although Conn. Gen. Stat., Section 10-329(b) is drawn with "precision", the appellees submit that it is not "tailored" to serve legitimate objectives of the State of Connecticut. As discussed *infra*, the statute is over-inclusive: it classified a bona-fide resident as an "out-of-state" student if application was made from without the State of Connecticut. There exist "less drastic means," the use of reasonable indicia of domiciliary intent, to distinguish the true bona-fide resident from the "out-of-

state" student. Thus, whether the affected interest involves welfare benefits or tuition fees,

> [D]urational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "*necessary* to promote a *compelling* governmental interest."
> *Shapiro v. Thompson, supra,* 394 U.S. at 634. *Dunn v. Blumstein,* 405 U.S. 330, 342 (1972) (citations omitted).

3. *The appellant's proffered justifications for the permanent, irrebuttable classification in question do not satisfy the compelling state interest standard under the Equal Protection Clause.*

a. Connecticut's objective of a partial cost equalization of higher education does not rise to the level of a compelling state interest.

The appellant contends that one of the objectives of Conn. Gen. Stat., Section 10-329(b) is an attempt by the Connecticut Legislature to equalize the cost of public higher education based upon the unproven assumption "that the resident or his parents have supported the State in the past and will continue to do so in the future." (Appellant's Brief on the Merits, at 11). As discussed *infra,* this attempted justification is not even sufficient to satisfy the traditional standard of review under the Equal Protection Clause.

In *Shapiro v. Thompson,* 394 U.S. 618 (1969), this Court expressly ruled that it is not a constitutionally permissible state objective to base a classification on the past tax contributions made by long-term residents to the State. *See, Shapiro, supra,* 394 U.S., at 632. In its

wisdom the Court foresaw the impact of a contrary result:

> Appellant's reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contribution of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.
> *Shapiro, supra,* 394 U.S. at 632-33 (footnote omitted).

See also, Boddie v. Connecticut, 401 U.S. 371, 381 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 265-66 (1970); *Rinaldi v. Yeager,* 384 U.S. 305 (1966); *Toomer v. Witsell,* 334 U.S. 385, 396-99 (1948); *Edwards v. California,* 314 U.S. 160 (1941).

However, even if the State of Connecticut is not constitutionally required to maintain institutions of higher learning, once it has undertaken to provide them, they are state facilities which must be made available to *all* bona-fide residents on equal terms. *See, Brown v. Board of Education,* 347 U.S. 483, 493 (1954). In *Shapiro v. Thompson,* 394 U.S. 618 (1969), this Court rejected the appellants' argument that cost equalization satisfied their burden of demonstrating a compelling governmental interest. In the case at bar, appellant's assertion of the same objectives serves to promote an invidious discrimination between two classes of bona-fide residents. Those students who have recently traveled into Connecticut and have established bona-fide residence are required by the express language of Conn. Gen. Stat., Section 10-329(b) to pay higher tuition fees than long-term bona-fide residents. Where invidious discrimina-

tion is mandated, the objective of partial cost equalization cannot be judicially sanctioned as a compelling state interest.

b. Connecticut's objective in establishing with administrative certainty the domiciliary intent of its college students does not satisfy the compelling state interest test.

Appellant recites that a second objective of the permanent, irrebuttable classification contained in Conn. Gen. Stat., Section 10-329(b) is to afford the State of Connecticut the opportunity to determine with "a degree of administrative certainty" the domicile of students who attend the University of Connecticut. As the appellant stated in his Brief on the Merits, at 15:

> Domiciliary intent is often difficult to determine for college students who seldom have set plans for their future homes. Use of durational residence requirements provides a degree of administrative certainty for both the institution and the student.

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), Tennessee argued that prevention of fraud was a justifiable purpose of the one year durational residency law. But as Mr. Justice Marshall concluded in *Dunn*, ". . . if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." 405 U.S., at 343. In striking down Tennessee's asserted purpose the Court found that the oath requirement, a "less drastic means' than the durational residency requirement, was altogether sufficient to protect against abuse of the registration process. 405 U.S., at 353.

In the case at bar appellees submit that "domiciliary intent", can be achieved through less restrictive means

than the permanent, irrebuttable presumption of non-residency in Conn. Gen. Stat., Section 10-329(b). Indeed, "domiciliary intent" may be exhibited through traditional indicia of residency. Thus, appellees submit that Connecticut's interest in "administrative certainty" is satisfied through a means of greater, not lesser, interference with their constitutional right to travel. For this reason, the appellant has failed to demonstrate a compelling state interest which justifies the penalization of their fundamental Constitutional right.

4. *The lower court cases of Kirk v. Board of Regents and Starns v. Malkerson, are a misunderstanding of the law of Shapiro as interpreted by Dunn v. Blumstein.*

Appellant erroneously contends that the Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969), exempted from future consideration all durational residency requirements save the one precluding newly arrived residents from receiving public assistance benefits. *Shapiro, supra*, at 638 n. 21.[19] (Appellant's Brief on the Merits, at 6). Were this contention viable the voting durational residency requirements in *Dunn v. Blumstein*, 405 U.S. 330 (1972), would never have been struck down. Since *Dunn* found unconstitutional Tennessee's durational residency requirement affecting the right to vote, appellees submit that the permanent irrebuttable classification of bona-fide Connecticut residents as non-

[19] The Court in *Shapiro* stated:

> We imply no view of the validity of waiting period or residence requirements determining eligibility to vote, eligibility for tuition free education, to obtain a license to practice a profession, to hunt or fish, and so forth. . . ."
> 394 U.S., at 638 n. 21 (1969).

residents for tuition purposes is of equal constitutional repugnance. Alternatively, appellees contend that the impact of n. 21 in *Shapiro, supra*, 394 U.S., at 638, was to leave for future consideration and scrutiny by the Court all durational residency requirements not squarely presented or challenged in *Shapiro*.[20]

In light of *Dunn* and *Shapiro*, appellant's reliance upon other cases concerning durational residency requirements affecting tuition for higher education is also misplaced. In *Kirk v. Board of Regents of University of California*, 273 Cal. App.2d 430, 78 Cal. Rptr. 260 (1st Dist. Ct. App., 1969), *appeal dismissed*, 396 U.S. 554 (1970), the lower court premised its decision upon a fundamental misunderstanding of the law of *Shapiro*, in light of *Dunn*, and a narrow and erroneous interpretation of n. 21 in *Shapiro*. The *Kirk* Court in discussing *Shapiro* chose to ignore the compelling state interest test to determine if there was a deterrence to travel. The court based its decision on a finding of no *actual* deterrence to travel by emphasizing the importance of n. 21 in *Shapiro*.

In so holding the *Kirk* Court stated:

> We do not think the addition of this footnote was an idle act to indicate the obvious fact that the opinion dealt merely with the questions presented.

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[20] This Court's decision in *Dunn v. Blumstein*, 405 U.S. 330 (1972), has unravelled at least one of the enigmatic implications of n. 21 in *Shapiro, supra*, 394 U.S., at 638. As the then Chief Justice Warren correctly pointed out:

> If a state would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote.
>
> *Id.*, at 654 (Warren, C.J. dissenting).

> Rather, we read the footnote to mean that the court did not necessarily intend to apply the same standards to other residents requirements like the one here in question.
> *Id.*, 78 Cal. Rptr., at 266.

Further, the court in *Kirk* incorrectly ascribed a higher value to obtaining welfare than to obtaining an education. We submit that in light of *Dunn*, the *Kirk* court's interpretation of *Shapiro* cannot stand, and is a fundamental misunderstanding of the law of *Shapiro*. *See*, *Dunn v. Blumstein*, 405 U.S., at 339.

The appellant also places a great emphasis upon *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn., 1970), (three-judge court), *aff'd mem.*, 401 U.S. 985 (1971). (Appellant's Brief on the Merits, at 6-7). We respectfully submit that *Dunn* effectively negated the *Starns* court's reasoning. In *Starns* the court was faced with a one year durational residency requirement. In discussing the deterrence to travel the *Starns* court attempted to distinguish *Shapiro* in two ways. First, the court read *Shapiro* to require that the tuition regulation must have the objective of actual deterrence of the right to travel to require the compelling interest test:

> Here, by contrast, there are no state of facts upon which this Court could posit, as a finding of fact, that the one year waiting period for resident tuition purposes was a specific objective excluding or even deterring out-of-state students from attending the University.
> *Starns, supra*, 326 F. Supp., at 237.

Second, the court in *Starns* based its decision on the fact that "*Shapiro* . . . had the effect of denying the basic necessities of life to needy residents." *Id.*, at 238. It then concluded that the "deterrent effect on interstate move-

ment . . . was readily apparent" in *Shapiro* and not so in *Starns*. *Id.* "There is no showing here that the one-year waiting period has any dire effects on the non-resident student equivalent to those noted in *Shapiro*." *Id.*[21] In *Dunn*, Mr. Justice Marshall clearly pointed out that "it is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel." 405 U.S. at 339 (1972). In effect the *Starns* decision is based upon the fact that the right to travel was not abridged in any constitutionally relevant sense. Just as the State of Tennessee's argument was rejected by *Dunn*, so too must the appellant's reliance upon *Kirk* and *Starns* fail. The *Dunn* Court has exposed the errors of the decisions in both *Kirk* and *Starns*. As *Dunn* has implied, regardless of the entitlement affected by the durational residency requirement:

> [D]urational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "*necessary* to promote a *compelling* governmental interest."
> *Dunn, supra*, 405 U.S. 330, 340-41. (emphasis supplied) (Citations omitted).[22]

In light of *Dunn*, appellees submit that as demonstrated above, the purposes proferred by the appellant do not satisfy the compelling state interest test.

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[21] The case of *Glusman v. Trustees of University of North Carolina*, 281 N.C. 620, 629, 190 S.E.2d 213, 219 (1972) is irrelevant to an argument on the fundamental right to travel since plaintiffs therein stipulated that the regulations in that case do not impede interstate travel.
(Appellant's Brief on the Merits, at 12).

[22] The strict equal protection test is no longer limited, if ever it once was, to situations in which the denial of a particular state benefit produces "dire effects". *Starns, supra*, 326 F. Supp., at

II.

EVEN UNDER THE TRADITIONAL EQUAL PROTECTION STANDARD, CONNECTICUT'S PERMANENT, IRREBUTTABLE PRESUMPTION OF NON-RESIDENCY IMPOSED ON BONA FIDE CONNECTICUT RESIDENTS FOR THE PURPOSE OF REQUIRING HIGHER TUITION PAYMENTS BEARS NO RATIONAL RELATION TO A LEGITIMATE GOVERNMENTAL INTEREST.

A. The Court Below Clearly Applied the Rational Equal Protection Test, and Concluded That Connecticut's Permanent, Irrebuttable Presumption of Non-Residency Imposed on Bona Fide Connecticut Residents Is Unconstitutional as Not Rationally Related to a Legitimate State Purpose.

The basic principles governing the application of the Equal Protection Clause of the Fourteenth Amendment were recently set out by the CHIEF JUSTICE in *Reed v. Reed*, 404 U.S. 71, 75-76 (1971):[23]

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238. The same limitation was urged upon this Court last term with respect to the Due Process Clause. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), Mr. Justice Stewart, writing for the majority, interred the unfounded conclusion that a prior "due process" hearing is required only in cases presenting property interests amounting to "absolute necessity", as was the case with welfare benefits in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In construing the Due Process Clause the Court re-stated the long-standing principle that the potential loss to the individual involved need only amount to an "important interest", not an "absolute necessity." *Fuentes, supra*, 407 U.S. 67, 89; *Bell v. Burson*, 402 U.S. 535, 539 (1971). By analogy this same rejection must be applied to the classification in question.

[23] As quoted by Mr. Justice Brenan in his opinion for the Court in *Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972).

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1968). The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

In invalidating Connecticut's out-of-state tuition statute, Judge Blumenfeld, writing for the Court below, intentionally applied these principles and clearly set out the rational basis standard. In partially quoting from this Court's opinion in *Eisenstadt v. Baird*, he stated:

> . . . since the statute is stigmatized as so arbitrary and unreasonable by its own terms as to be unconstitutional, we do not reach the question of whether to test the validity of the "out-of-state" classification as being 'not merely *rationally related* to a valid public purpose, but necessary to the achievement of a *compelling* state interest.' Eisenstadt v. Baird, 40 U.S.L.W. 4303, 4306 n. 7 (U.S., Mar. 22, 1972).

Kline v. Vlandis, 346 F. Supp. 526, 529 n. 4 (1972) (emphasis in original).[24]

The Court clearly applied this standard as follows:

It is not enough to say that the state has power to treat different classes of persons in different ways, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); the classification must be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). See also, *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-resident than on resident students, that state may not classify as "out-of-state students" those who do not belong in that class. *Kline v. Vlandis*, 346 F.Supp. 526, 528 (1972).[25]

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[24]The footnote to *Eisenstadt* continues:

But just as in Reed v. Reed, supra, we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

[25]Connecticut is not without guidance on these principles in its own law. In *Valentine v. Pollak*, 95 Conn. 556, 561, 111 A. 869, 871 (1920) the Connecticut Supreme Court stated: "A presumption of law must be based upon facts of universal experience and be controlled by inexorable logic." (no conclusive presumption of alienation of affection in every case of adultery). In *Duscharme v. City of Putnam*, 161 Conn. 135, 141-43, 285 A.2d 318, 321 (1971), the Court held that a conclusive presumption which barred an employer from attempting to prove an employee's heart ailment was not causally connected to employment, violated Equal Protection. The Court stated:

Constitutionally, the legislature can no more bind the courts to such a factually unsupportable conclusive adjudication

Thus, the appellant has misunderstood the lower court opinion in submitting that the lower court failed to utilize this standard. (Appellant's Brief on the Merits, at 5).

B. Connecticut's Permanent Irrebuttable Presumption of Non-Residency Is Unconstitutional in that It Is Not Rationally Related to the Purpose of Distinguishing Between Bona Fide Connecticut Residents and Non-Residents for the Proffered Purpose of Equalizing the Cost of Higher Education.

1. *The criterion employed is not rationally related to the objective of proving domicile.*

It is important to note what is not at issue in this case. The unanimous opinion of the Three-Judge District Court did *not* invalidate the option of the state to classify students as resident and non-resident students thereby obligating non-resident students to pay a higher tuition than that paid by bona fide residents. Nor did that opinion invalidate the option of the state to use a durational residency test as a rebuttable presumption of non-residency.[26]

The opinion merely invalidated the option of the state to use a conclusive presumption to classify new bona fide Connecticut residents as something they are not. As the Court clearly stated:

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than it can require their adjudication that a camel is a horse by the enactment of a statutory conclusive presumption that all four-footed animals are horses. *Cf. Heiner v. Donnan*, 285 U.S. 312, 328-29 (1932).

[26] Consistent of course, with the standards in *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Dunn v. Blumstein*, 405 U.S. 330 (1972).

> Assuming that it is permissible for a state to impose a heavier burden of tuition and fees on non-resident than on resident students, that state may not classify as "out-of-state students" those who do not belong in that class.
> *Kline v. Vlandis*, 346 F.Supp. 526, 529 (1972).

The narrow issue presented by this case is whether a state may, consistent with the Equal Protection Clause, impose a permanent, irrebuttable presumption of non-residency for tuition purposes upon new bona fide Connecticut residents solely on the criterion that those persons lived outside Connecticut when they filed their application, and without regard to any other attendant facts and circumstances.

Section 10-329(b) of the Connecticut General Statutes states that a married student shall be classified as "out-of-state" if his "legal address at the time of his application . . . was outside of Connecticut."

With respect to single students, the statute provides that a student will be classified as "out-of-state" if his legal address "for any part of the one-year period immediately prior to his application . . . was outside of Connecticut."

These classifications are irreversible. They may never change since the statute further commands that:

> The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education . . . shall be his status for the entire period of his attendance at such constituent unit.[27]

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[27] Conn.Gen.Stat., Section 10-329(b)(App. 11a).

Connecticut's durational residency provision for tuition purposes divides new bona fide residents into two classes based wholly on recent migration. The only distinction between these two classes of bona fide residents is that some have had a legal address within the state *before* applying to college and some have not (with the additional unexplained burden that unmarried people must have had a legal address within the state for at least one year before applying).[28] These new bona fide resident students are forever cast into the same classification as are out-of-state non-resident students.

Once a permanent classification has been shown, it becomes the duty of the state, under traditional review, to furnish a legitimately defensible difference. To satisfy the reduced burden of justification under the traditional equal protection standard, the state must show (a) that it has a legitimate policy goal it is seeking to promote, and (b) that there is a rational relationship between the end sought and the chosen means to that end. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

The appellant proffers that the purpose of this scheme is to attempt to equalize the cost of education between those who are bona fide citizens of the State of Connecticut and those that are not. (Appellant's Brief on the Merits, at 15).[29] Implicit in this reasoning is the assumption that the state may require proof of the bona fides of its citizens before allowing them to enjoy the benefit of reduced tuition. *See, Glusman v. Trustees of*

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[28] See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[29] The Appellant states: "By fixing a students' residence status in this manner the state insures that its bona fide in-state students will receive their full subsidy." (Appellant's Brief on the Merits, at 15).

the University of North Carolina, 218 N.C. 620, 190 S.E.2d 215, 220 (1972) (quoted in Appellant's Brief on the Merits, at 13). To sustain this assumption the appellant must show that there is a rational relationship between this end and the chosen criteria (where the person lived when he applied) and the means (an irreversible determination of non-residency). *McGowan v. Maryland, supra.* The permanent classification of a Connecticut resident into the status of an out-of-state non-resident student solely on the basis of that person's address when he submitted his college application is not rationally related to this objective. *See, Turner v. Fouche*, 396 U.S. 346, 394 (1970); *Tot v. United States*, 319 U.S. 463, 467 (1943).

The objective of equalizing the cost of public higher education between bona fide Connecticut citizens and non-residents may not be without some legitimacy. However, basing the bona fides of citizenship on the sole test of where a person lived when he applied to the University of Connecticut is a criterion wholly unrelated to the objective of that statute. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). (Sex as a criterion wholly unrelated to qualification as executor of a decedent's estate).

In *Turner v. Fouche*, the Court invalidated the Georgia requirement that one be a freeholder to qualify for school board membership on the ground that it was not rationally related to the purpose of responsible participation in education decisions. As Mr. Justice Stewart stated for the unanimous Court:

> However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the County whose estates are less than freehold.
> *Turner v. Fouche*, 396 U.S. 346 (1970).

So too in the instant case. The lack of domiciliary intent cannot rationally be conclusively presumed from the fact that one applied to the University of Connecticut from outside of the state, as is evident from the situation of appellee Kline. As the Court stated in *Mobile, J.&K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910):

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.* (death occuring in the operation of locomotive is prima facie evidence of negligence). (emphasis added).

In the instant case, the appellees are permanently denied the right to present evidence to overcome the conclusion that, solely because they are students who applied from outside Connecticut, they are not and may never become bona fide residents. It is this *a priori* notion that violates equal protection. The irrationality of this scheme is magnified by the fact that the lower Court specifically found both appellees to be bona fide residents of the State of Connecticut.

Lastly, the scheme falls by the weight of its own contradictions. The appellant states that:

> By fixing a student's residence status in this manner the state insures that its bona fide in-state students will receive their full subsidy.
> (Appellant's Brief on the Merits, at 15).

Logically, it is impossible for bona fide Connecticut residents who attend college in Connecticut to be ont-of-state students. Instead, the statute insures that the appellee domiciliaries who are in-state students will in fact *not* receive their full subsidy.

Thus, this scheme, based solely on the presumption that since a student applied to the University from out of state, he may never become a resident, and which precludes the offer of any proof of a change in circumstances, is not rationally related to the objective of proving domicile.

2. *Reasonable criteria for determining bona fide residence are not only available, but are now in use by the appellant.*

The criteria related to the establishment of a bona fide residence within a state must logically include an examination of those indicia constituting domicile within that state. Indeed, since the law in question was invalidated, Connecticut, through an official opinion of the Attorney General of the State, has adopted relevant criteria for evaluating domicile.[30] These criteria state:

> Each individual case must be decided on its own particular facts. In reviewing a claim [for re-classification] *relevant criteria* include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc. (emphasis added).

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[30] These criteria appear in an Opinion of The Attorney General of the State of Connecticut, dated September 6, 1972, which is unreported. The text is reproduced as Appendix A to this Brief. It is noteworthy that this official opinion is signed also by appellant's counsel.

Noticeable by its absence is any reference to where the student lived when he *filed* his application.

Depending upon the facts and circumstances of each individual situation, the new criteria permit the adoption of no waiting period, or a flexible waiting period for reclassification as a resident student.[31] The new criteria permit reclassification at the beginning of each semester. In addition, the University has appointed a "Residency Hearing Officer" and has established an appeal procedure to the University Provost for review.

The mere fact that Mrs. Kline was unfortuitous enough to apply from California should not bar her from ever asserting bona fide residence in Connecticut. So too with the appellee, Catapano. The appellant claims that the durational residency requirement with respect to single students is easily satisfied since "an individual may delay his studies [for one year] and establish in-state residency for a future application." (Appellant's Brief on the Merits, at 5). Such a burden and penalty on a new bona fide resident is unreasonable. As the court noted in *Shapiro*:

> Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.
> *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

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[31] *See*, answers to questions 3 and 5, at 3a, 4a in the Appendix to this Brief.

As has been pointed out above, reasonable criteria of bona fides exist so that appellant has no need to use this requirement for the governmental purposes suggested.[32]

C. Cost Equalization Between New Bona Fide Residents and Old Bona Fide Residents on the Basis of Contributions Made Through the Payment of Taxes Is an Impermissible State Purpose.

The issue presented in this case is not cost equalization between resident and non-resident students but the use of an irrational-irrebuttable presumption which classifies residents as non-residents. Cost equalization is not a proper reason for distinguishing between two classes of bona fide residents both composed of citizens of the State of Connecticut. *Shapiro* forbids the state from allocating services among its citizens on the basis of their higher past tax contribution. *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969).

Nor is it true that "all new residents are required to pay a greater portion of the cost of their education" as the appellant claims.[33] (Appellant's Brief on the Merits,

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[32] "The largest criticism of the tuition waiting period as a device for proving domiciliary intent is that its burden falls too often on people whose intent is not seriously doubted. While the waiting period is aimed at discouraging students from seeking resident status when they do not really intend to become residents, too often it works a hardship by denying a student who is clearly a permanent resident benefits given to other residents. Such a hardship could be avoided if the waiting period requirement could be waived in cases where the student presented unusually convincing evidence of domiciliary intent."
Note, *The Constitutionality of Non-Resident Tuition*, 55 Minn. L.Rev. 1139, 1158-59 (1971).

[33] Even if the appellant's position were true, the contention that the demands of equal protection are fully met when the law applies

at 10). A close analysis of a few examples under this scheme will reveal its irrational and invidious nature. The strongest example is the case in question. The appellee Kline is a transfer student who married a life-long Connecticut domiciliary. She applied to the University and was accepted. It is undisputed that she then moved to Connecticut and established a permanent home. She has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. In spite of all these indicia of domicile, she is permanently and irreversibly deemed to be a non-resident student and forced to pay twice as much tuition as older Connecticut residents. Yet, under this scheme a married transfer student who moves to Connecticut one day before he applies to graduate school is entitled to the in-state tuition benefit completely and wholly without regard to any indicia of domicile. The appellee Catapano, however, who applied from out-of-state, moved her residence to Connecticut, acquired a Connecticut driver's license and car registration and who has been found by the lower court to be a bona fide resident, is permanently and irreversibly deemed to be a non-resident student because she did not live in Connecticut for a full year before she applied to the University.

Nor are these exceptional circumstances. A family moves to Connecticut for a new start, the father acquires a job, pays taxes, and the children attend public school.

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equally to all within the statutory class has been soundly repudiated. *Compare, Poinell v. Pennsylvania,* 127 U.S. 678, 687 (1888) *with McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) where the Court stated:

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation.

See also, Carrington v. Rash, 380 U.S. 89, 93 (1965).

The young boy finishes his senior year in high school and applies to the University of Connecticut and is permanently classified an out-of-state student because he has not had a legal address in Connecticut for a full year. A life-long Connecticut resident, whose parents are citizens of the state and who temporarily moved to another state for a short period of time and then returned to Connecticut to attend college would now and permanently be classified as an out-of-state student. Surely, this flies in the face of the proffered purpose of equalizing the cost of higher education between bona fide Connecticut citizens and out-of-state students.

Nor will it suffice to claim legitimacy for this scheme and deny its invidiousness by merely stating that it is reasonable to favor "established residents," (Appellant's Brief on the Merits, at 11) when there is no way of "establishing" that residency. In *Carrington v. Rash*, 380 U.S. 89, 96 (1965), Mr. Justice Stewart, writing for the Court, stated that while a state is free to take reasonable steps to see that all applicants to vote actually fulfill the requirements of bona fide residence:

> By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment.

Thus, the newly arrived resident suffers most from the arbitrary action spoken of by Mr. Justice Jackson concurring in *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949)[34] where he warned of the danger when officials are allowed

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[34] Cited in *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

> . . . to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Nor will it suffice to deny absurdity for this permanent, irreversible scheme by stating merely that it provides degree of "administrative certainty" for the student. (Appellant's Brief on the Merits, at 15). For the poor student, the certainty is of a different kind. Administrative convenience is not a matter which will allow invidious discrimination against the class of newly arrived bona fide residents. *Shapiro v. Thompson*, 394 U.S. 618, 636, 638 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972). *See also*, *Carrington v. Rash*, 380 U.S. 89 (1965).

Thus, by imposing an invidious discrimination on new bona fide residents the Connecticut system of permanent tuition classification violates the standard set in *Dandridge v. Williams*, 397 U.S. 417, 487 (1970) and *Jefferson v. Hackney*, 406 U.S. 535 (1972). The irrebuttable presumption of non-residency is invidious because there is not even a tenuous connection between the classification of residents and non-residents and the procedure employed in the case at bar, permanently imposing out-of-state status on a new bona fide resident. As the lower Court concluded ". . . the statute is stigmatized as being so arbitrary and unreasonable by its own terms as to be unconstitutional . . ." *Kline v. Vlandis*, 346 F.Supp. 526, 529 n. 4 (1972). Thus, the constitutional guarantee of equal protection limits the state's power to absolutely deny a bona fide Connecticut resident the opportunity of being reclassified as a resident student.

D. The Reasoning in the Lower Court Cases of *Clark v. Redeker*, and *Starns v. Malkerson*, applying *Carrington* Will Not Support Appellant's Contention That a Permanent and Absolute Classification of Non-Residency Is Constitutionally Rational.

The case of *Newman v. Graham*, 82 Idaho 90, 349 P.2d 716 (1960) is directly in point. Just as in Connecticut, the Idaho regulation provided that any student classified as a non-resident for tuition purposes was to retain that status throughout his tenure at the university. The Idaho court, in striking down the regulation said at 349 P.2d 719:

> It does not afford any opportunity to show a change of residential or domiciliary status and does in effect deny equality of opportunity to persons of the same class who are similarly situated and for that reason it is an unreasonable regulation. It is the denial to the applicant of an opportunity to be heard in the matter, within a reasonable time, that constitutes the objectionable feature of the regulation here considered.

In *Carrington v. Rash*, 380 U.S. 89 (1965), this Court has specifically ruled against the constitutionality of an irreversible resident classification. There the Court invalidated a section of the Texas Constitution which prevented a member of the Armed Services of the United States who first established his home in Texas during the course of his military duty from acquiring Texas residence for voting purposes so long as he remained a member of the Armed Forces. The Court recognized that although Texas had the right to require its voters to be residents, it held that by forbidding a serviceman the opportunity of ever controverting the presumption of

non-residence, the Texas Constitution imposed an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment. *Id.*, at 96.

The State of Connecticut has done the same here. By denying a new Connecticut resident the opportunity of ever controverting the presumption of non-residence they have imposed the same type of invidious discrimination found present in the Idaho regulation in *Newman.*

The lower Federal Court Cases of *Clark v. Redeker* and *Starns v. Malkerson* will show first that the reasoning in *Carrington v. Rash*, 380 U.S. 89 (1965) is not limited to voting as the appellant claims (Appellant's Brief on the Merits, at 9-10) and second that those Courts' consideration of *Carrington* contains persuasive reasoning against the type of absolute and irreversible classification held unconstitutional in *Kline v. Vlandis.*

In *Clark v. Redeker*, 259 F.Supp. 117 (S.D. Iowa, 1966), 406 F.2d 883 (1969), *cert. denied*, 396 U.S. 862 (1969), Iowa tuition regulations imposed a one-year residency requirement before a student could be considered to be an Iowa resident. The regulations further set up a Review Committee to which a student might appeal his classification. In upholding the regulations the court held that they are not set up in terms of an absolute classification and noted:

> If appropriate facts and circumstances arise subsequent to a student's classification as a nonresident, there is *nothing in the regulations which would prevent his reclassification as a resident.* The student is merely required to present sufficient evidence to overcome the presumption of nonresidence.
> *Clark v. Redeker*, 259 F.Supp. 117, 122 (S.D. Iowa, 1966) (emphasis supplied).

In *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn., 1970) *aff'd. mem.* 401 U.S. 985 (1971), the court conceded that the Minnesota tuition regulations providing for a one-year residency requirement for out-of-state students economically discriminates against a class of residents. It stated that although there is a presumption of non-residency against a student from another state, that presumption can be overcome by sufficient evidence to show bona fide domiciliary within the state. The court concluded, that in Minnesota, there is ". . . *no arbitrary or permanent classification of the type found to constitute invidious discrimination in Carrington v. Rash . . .*" *Starns v. Malkerson, supra,* at 240 (emphasis added).

A third case from the Supreme Court of California is equally persuasive, *Kirk v. Board of Regents of University of California,* 273 Cal. App. 430, 78 Cal.Rptr. 260 (Ct. App., 1969), *Kirk* following *Clark v. Redeker, supra,* upheld the one-year residency requirement and noted that in California the durational residency requirement is not set up in terms of an absolute classification. If appropriate facts and circumstances arise subsequent to a student's classification as a non-resident, "there is nothing in the regulation that would prevent petitioner's reclassification as a resident." The Court concluded that:

> There is here, unlike Newman and Carrington, no arbitrary permanent classification of non-residency which prohibits her from subsequently proving that she does, in fact, qualify for resident tuition.
> *Kirk v. Board of Regents of the University of California, supra,* at 269.

Clark, Starns and *Kirk* may further be distinguished on the basis that each was considering a one year waiting period for in-state tuition status. In the instant case the

classification is permanent. Further, the Courts in *Clark* and *Starns* did not have the benefit of this Court's opinion in *Dunn v. Blumstein*, 405 U.S. 330 (1972) as to the proper interpretation of *Shapiro*. Nor did the Courts in *Clark* and *Starns* have the evidence of actual deterrence in the record,[35] nor were they faced with a situation where, because of the financial penalty on the right to travel the appellees would not have been able to continue their education.[36] Therefore their decisions upholding a one-year waiting period are clearly distinguished on their facts alone.

We believe that this is the proper application of *Carrington*. Cases such as *Glusman v. Trustees of University of North Carolina*, 281 N.C. 620, 190 S.E.2d 213 (1972) and *Thompson v. Board of Regents*, 187 Neb. 285, 188 N.W.2d 840 (1971) have blindly followed *Clark* and *Kirk* and fundamentally misunderstood *Carrington* and *Shapiro*. As the dissent in *Thompson*, *supra*, pointed out:

> There is no rational or reasonable basis on which an individual who has been a bona fide resident of and domiciled in the state for the initial period of time required by statute, should be denied the right to

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[35] The right to travel issue was not raised in *Clark*.

[36] Oral argument and testimony in *Kline* was heard on January 7, 1972. However, on December 27, 1971, testimony on appellees' motion for a Preliminary Injunction was heard. The appellees were proceeding *in forma pauperis* and testified that they would be barred from attending class for the second semester if they failed to pay the full amount of out-of-state tuition and fees by January 3, 1972. Due to the fact that the University granted eleventh hour financial aid to the appellees, the motion was denied. (App. 1a), see, *Kline v. Vlandis*, 346 F. Supp. 526, 527 n.2 (1972).

> prove that fact simply because he was in attendance at 'any institution of learning in this state' . . . *Thompson v. Board of Regents,* 187 Neb. 285, 188 N.W.2d 840, 845 (1971) (dissenting opinion). See also, *Robertson v. Regents of the University of New Mexico,* 350 F. Supp. 100 (D.N.M. 1972).

Therefore, even under the traditional equal protection standard, Connecticut's permanent, irrebuttable presumption of non-residency for tuition purposes is not rationally related to a legitimate governmental interest.

III.

THE CLASSIFICATION OF BONA FIDE RESIDENTS OF THE STATE OF CONNECTICUT AS NON-RESIDENTS FOR THE PURPOSE OF REQUIRING HIGHER TUITION PAYMENTS VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

A. Connecticut's Utilization of a Classification Procedure Which Creates a Permanent Irrebuttable Presumption of Non-Residency Violates the Minimum Standards of Due Process Required Before the Deprivation of Constitutionally Protected Interests.

The manner in which appellees were deprived of their rights and property is violative of due process required under the Fourteenth Amendment.[37] The Connecticut statute classified Connecticut residents as non-resident

[37] In the lower court opinion, Judge Blumenfeld stated: "The plaintiffs rely on both the due process and the equal protection clause. We do not consider these separately because '. . . the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive, . . . *'Boilling v. Sharpe*, 347 U.S. 497, 499 (1954)" *Kline v. Vlandis*, 346 F. Supp. 526, 528 (1972) (App.Jur. 4a). They are separated here for the convenience of argument.

out-of-state students under an irrebuttable presumption that out-of-state applicants are non-residents throughout their continuing scholastic careers. Appellees are not challenging the rationality of the state's classification of residents and non-residents for the purpose of tuition charges. It is the procedure utilized to classify that offends due process.

By legislating an irrebuttable presumption of non-residency, the state has deprived new bona fide resident students of any opportunity to rebut the factual assumption of non-residency. In this manner all newly arrived students are classified as non-residents without an opportunity for a hearing as to the applicability of the presumption to their case. As stated by the court below:

> Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-resident than resident students, the state may not classify as 'out of state students' those who do not belong in that class.
> *Kline v. Vlandis*, 346 F.Supp. 526, 528 (1972).

In *Heiner v. Donnan*, 285 U.S. 312 (1932), this Court held that the failure to give a party an opportunity to demonstrate the inaccuracy of a statutory presumption violated the Due Process Clause. The statute in *Heiner* conclusively presumed that a transfer of property within two years of death was made in contemplation of death and a higher tax was imposed. The Court said:

> [W]hether the . . . presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality. . . . This court has held more than once that a statute creating a presumption which

> operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment.
> *Heiner v. Donnan*, 285 U.S. 312, 329 (1932).

Because statutes containing irrebuttable presumptions are devoid of any procedural safeguards whatsoever, they have been consistently struck down as unconstitutional by this Court. *See, Heiner v. Donnan*, 285 U.S. 312 (1932); *Schlesinger v. Wisconsin*, 270 U.S. 230 (1924); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); and *Carrington v. Rash*, 380 U.S. 89 (1965).

The argument typically put forth in support of a statutory irrebuttable presumption is that the classification procedure is a cost-saving device eliminating hearings and fraud.[38] The decisions have consistently pointed out that fundamental constitutional rights are superior to administrative efficiency and cost. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Carrington v. Rash, supra*; and *Heiner v. Donnan*, 285 U.S. 312 (1932).[39] Additionally, irrebuttable presump-

[38] The State of Connecticut is free to create a rationally related rebuttable presumption of non-residency for out-of-state university applicants. The state did not see fit to implement such a procedure to protect its financial interest but now complains of the high cost required by the loss of their irrebuttable presumption.

[39] As the Court stated in *Heiner v. Donnan*, 285 U.S. 312, 328 (1932):

> to sustain the validity of this irrebuttable presumption it is argued, with apparent conviction, that under the prima facie presumption originally in force there had been a loss of revenue, and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a

tions are by their very nature counterproductive in denying state benefits and protection to the very people the state intends to benefit. *See, Stanley v. Illinois*, 405 U.S. 645 (1972). The purpose behind the statute in question, to require non-residents to pay additional tuition fees, is defeated when residents as opposed to non-residents are required to pay the additional tuition fees.

The statutory scheme in this case excludes the important factor of residency from the state's determination to deprive or grant the state provided entitlement in issue. Any hearing under the Connecticut statutory scheme would preclude inquiry into the issue of residency. Just as in *Bell v. Burson*, 402 U.S. 535 (1971), where the statutory scheme eliminated the important factor of liability from consideration in the depriving or granting of a driver's license, Connecticut eliminates from consideration the important factor of residency.[40] As the Court stated in *Bell*:

> The hearing required by the Due Process Clause must be 'meaningful,' *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S.Ct. 1187 (1965) and 'appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co., supra*, at 313, 94 L.Ed. at 872, 873. It is a proposition which

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more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement and distinctly repudicated by this court in the Schlesinger's Case and Hoeper's Case . . ."
(citations omitted).

[40] Connecticut does not provide the type of meaningless hearing available under the Georgia statutory scheme in *Bell v. Burson, supra*. The Georgia statute violated the Due Process Clause not because it provided a meaningless hearing but because it provided for the deprivation of a state entitlement without a hearing on the determinative issue.

> hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard. *Bell v. Burson*, 402 U.S. 535, 542 (1971).

The Connecticut statutory scheme does not even provide the type of meaningless hearing present in *Bell v. Burson, supra.* Furthermore, a Connecticut hearing under Conn.Gen.Stat., Section 10-329(b) would have the same inherent flaw present in the Georgia statute in *Bell v. Burson.* Both statutes contain an irrebuttable presumption which precludes a hearing inquiry into the fundamental factor in the state's determination to grant or deny: in Georgia–liability, and in Connecticut–residency.

B. Connecticut's Irrebuttable Presumption of Non-Residency Deprives Appellees of Three Important Interests of Property, Interstate Travel, and a State Provided Education Without Due Process of Law.

In its opinion, the lower court examined the various indices of residency and found that Margaret Marsh Kline and Patricia Catapano were bona fide residents of the State of Connecticut. App. Jur. 5a-6a and *Kline v. Vlandis,* 364 F.Supp. 526, 527-528 (1972). In spite of their residency, both were classified as non-residents and permanently required to pay higher tuition charges. *Kline v. Vlandis, supra,* 527 and 528. The minimal effect of this statutory classification upon Connecticut student residents deprives them of property through increased tuition charges as a result of a permanent irrebuttable presumption contrary to fact. But for the initiation of this lawsuit the classification of the two appellees would

have caused the termination of their education in the State of Connecticut. Under threat of court injunction the University provided loans to these impoverished students to enable them to continue their education in spite of the additional tuition charges. *Kline v. Vlandis, supra,* 527 n. 2. The unrefuted testimony of both appellees demonstrated that the classification of non-residency could have forced appellees to continue their education outside of the State of Connecticut. (A. 22a and 23a). In Mrs. Kline's case she would have been prevented from traveling to and residing in the state in which her husband has a life-long residency.

The statutory classification of the resident appellees as non-residents terminates three important rights to which appellees are constitutionally entitled: property, inter-state travel, and state provided education.

1. *Property*

Through increased tuition charges appellees are deprived of their personal property by virtue of a totally incorrect but nevertheless irrebuttable presumption that they are non-residents. The 1972 tuition differential between. in-state and out-of-state students of $450.00 would have an obvious detrimental effect on appellees who are appearing *in forma pauperis.*

The importance of property to the individual and the necessity for due process before its deprivation is a basic component required by the due process clause. *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Heiner v. Donnan,* 285 U.S. 312 (1932); *Coe v. Armous Fertilizer Works,* 237 U.S. 413 (1915).

The importance of property rights was recently reaffirmed in *Lynch v. Household Finance*, 405 U.S. 538, 552 (1972):

> The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.

The fundamental interdependence between the personal right to liberty and property are amply demonstrated by the domino effect that the personal right to property deprivation has on appellees' right to travel and right to a state provided entitlement.

2. *Interstate travel.*

The irrebuttable and incorrect presumption of non-residency infringed upon appellees' right to travel to the point that appellee Kline would have remained in California had she been aware of the pending Connecticut non-residency classification. The injustice and the irrationality of the classification is such that she can no longer return to California as a student resident.[41] Once Margaret Kline established residency in Connecticut she became a student non-resident in Connecticut as well as in California.

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[41] 'A resident student' means any person who has been a bona fide resident of the state for more than one year immediately preceding the opening of the university.
Deering's California Codes, *Section 23054.*

The right to travel interstate is a fundamental constitutional right. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

3. *State provided education.*

The termination of higher education benefits provided by the State of Connecticut to its residents involves important constitutional rights.

This Court unanimously stressed the fundamental importance of educational opportunity in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

The analogy between education and voting is quite direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is "preservative of other basic civil and political rights. . . ." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.

The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. This Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed "the most

powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most persuasive means for promoting our common destiny." *McCollum v. Board of Education*, 333 U.S. 203, 216, 231 (1948), (Frankfurter, J., concurring).

The California Supreme Court has recently considered statutory classifications touching upon education, and challenged on equal protection grounds. *Serrano v. Priest*, 487 P.2d 1241 (1971). In an opinion, discussing its own decisions and those of this Court, commentaries and other pertinent factors, the Court concluded: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'." *Id.* at 1258 (footnote omitted).

Furthermore, education is precious not only in its own right, but also because it provides the tools necessary for exercising other rights which the Supreme Court has recognized as fundamental–voting, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); speech, *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1937); association, *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); and travel, *Shapiro v. Thompson, supra*, at 629-63.

> [E]ducation underlies the whole substance of the political process and its antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him."
>
> Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal.L.Rev. 305, 368 (1969).

The increasing importance of higher education in our society cannot be denied. Financial and social success, career opportunities, personal and institutional association, and status are all positively affected by the extent of one's higher education.

The deprivation of a state provided entitlement such as education must be accompanied by the procedural due process required by the Fourteenth Amendment. As stated in *Bell v. Burson*, 402 U.S. 535, 539 (1971):

> [R]elevant to constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' Sherbert v Verner, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963) (disqualification for unemployment compensation); Slochower v Board of Education, 350 US 551, 100 L Ed 692, 76 S Ct 637 (1956) (discharge from public employment); Speiser v Randall, 357 US 513, 2 L Ed 2d 1460, 78 S Ct 1332 (1958) (denial of a tax exemption); Goldberg v Kelly, supra, (withdrawal of welfare benefits). See also Londoner v Denver, 210 US 373, 385-386, 52 L Ed 1103, 1112, 28 S Ct 708 (1908); Goldsmith v Board of Tax Appeals, 270 US 117, 70 L Ed 494, 46 S Ct 215 (1926); Opp Cotton Mills v Administrator, 312 US 126, 85 L Ed 624, 61 S Ct 524 (1941).

While a hearing is not required to satisfy due process under the Fourteenth Amendment "in every conceivable case of governmental impairment of private interest," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961), nevertheless, each of the three important interests of property, right to travel, and a statement entitlement present in the instant case require due process in the form of a factual hearing before deprivation. Interests recently deemed by this Court to have been substantial enough to require a due process factual hearing before deprivation

have ranged from automobile licenses, *Bell v. Burson*, 402 U.S. 535; welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); a putative father's interest in his children, *Stanley v. Illinois*, 405 U.S. 645 (1972); wages, *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); and household furnishings and clothing, *Fuentes v. Shevin*, 407 U.S. 67 (1972).[42]

The classification of appellees as non-resident out-of-state students deprives appellees of the three important interests of property, interstate travel and a state provided education, each of which require due process of law. Connecticut's utilization of a classification procedure which creates a permanent, irrebuttable presumption of non-residency violates the standards of due process required before the deprivation of these constitutionally protected interests.

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[42] The Fuentes v. Shevin, *supra*, decision recognized the necessity for a due process hearing when an individual is deprived of property and explicitly rejected restricting due process to the deprivation of necessities.

> No doubt, there may be many gradations in the 'importance' or 'necessity' of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest such distinctions. The Fourteenth Amendment speaks of 'property' generally. And, under our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to be to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that by its lights are 'necessary.'
> *Fuentes v. Shevin*, 407 U.S. 67, at 89.

CONCLUSION

For the reason that Connecticut's irrebuttable presumption of non-residency violates the Fourteenth Amendment, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

OPINION OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT REGARDING NON-RESIDENT TUITION SEPTEMBER 6, 1972

STATE OF CONNECTICUT

ROBERT K. KILLIAN
ATTORNEY GENERAL

ATTORNEY GENERAL'S OFFICE
90 TRINITY STREET
HARTFORD

September 6, 1972

Chancellor Warren G. Hill
Commission for Higher Education
P. O. Box 1320
Hartford, Connecticut 06101

Dear Chancellor Hill:

In your letter you ask a number of questions regarding implementation of the recent Federal Court decision declaring unconstitutional the provisions of Public Act No. 5, Section 126, which provides for permanent out-of-state classification for students attending constituent units of the state system of higher education. Before answering your specific questions, certain background comments might be helpful. The decision of the Court did not prohibit the State from charging an out-of-state differential in tuition and fees. The decision was rather directed against a classification system which placed a student in a permanent category prior to his initial admission. The practical thrust of the Court's opinion is that out-of-state tuition may not be charged to

students who, although originally classified as out-of-state, establish bona fide residence in Connecticut.

This office has filed a notice of appeal to the United States Supreme Court in the tuition case and has also requested that the Court stay its order enjoining the State from classifying students in accordance with the statute. The request for a stay was denied by Mr. Justice Marshall on August 3, 1972. We shall keep you advised of the further course of this litigation. However, pending a final decision in the case, the constituent units should take steps to ensure the provision of procedures whereby a student classified as out-of-state may petition to have his status reviewed.

In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc.

In answer to your specific questions:

(1) Should the units of the state system of higher education refund all out-of-state tuition and fees collected pursuant to Public Act No. 5, Section 126? If it is your opinion that the tuition should be refunded to those students who were improperly classified, what criteria should be applied in making individual judgments?

A. In the event the United States Supreme Court upholds this decision, the out-of-state differential should be refunded to improperly classified students. The burden is upon the student to demonstrate that at some point in time he became domiciled in Connecticut. In making its judgment in this matter, it would be proper for a constituent unit to consider the above listed and similar criteria.

(2) What criteria with respect to residence should the units utilize in classifying students for the Fall, 1972 and subsequent semesters and terms?

A. Usual criteria.

(3) May the units adopt their own criteria for Fall of 1972? In this connection, would adoption of the following meet the requirements of the Federal Court:

(a) a standard of one year as minimum residence for purposes of levying tuition and fees as in-state students;

(b) a standard of less than one year.

(c) Would it be advisable to utilize provisions proposed in House Bill #5302 as criteria? This Bill was proposed in the most recent session but did not become law. In essence, this Bill provided that an emancipated student could establish Connecticut residence after a period of six months.

A. (a) In the case of *Starns v. Malkerson*, 326 F. Supp. 254 (D. Minn.) (1970) aff'd Mem. 39 U.S.L.W. 3423, (1971), concerning tuition differential at the University of Minnesota, a

minimum of one year domicile was upheld. Accordingly, it is our opinion that a properly enacted minimum domicile of one year for purposes of levying tuition and fees as in-state students would be acceptable.

(b) Yes.

(c) Yes. It should be noted that the substitute for House Bill #5302 was enacted by the Legislature as Public Act 213, and subsequently vetoed.

(4) In connection with the regulations suggested in Paragraph (3) above, is it legally permissible to classify as "out-of-state" one who is a registered voter in Connecticut? We have in mind the situation where college students over eighteen years of age may register to vote in a college town.

A. In our opinion, the mere fact of registering to vote does not in and of itself constitute domicile for tuition purposes. The other criteria should also be considered.

(5) Shall spouses of students classified as residents also be classified as residents even though their place of residence at the time of original application was out-of-state? If their place of residence was in-state at the time of application?

A. Yes, assuming there is no waiting period established.

(6) Shall married students under voting age, who have lived in the state with their spouses for at least six months, be classified as residents?

A. Yes, assuming they meet the criteria for domicile.

(7) Shall students under voting age who have graduated from a high school in Connecticut and have enrolled in a unit of the state system of higher education be classified as residents even though their parents have moved out-of-state prior to the time of their enrollment in college?

A. No, unless they meet other criteria.

(8) Shall members of the armed forces based in the state and the spouse and children of such armed forces members based in the state be classified as residents?

A. Yes, provided they meet other criteria.

(9) Shall honorably discharged members of the armed forces who designate Connecticut as their home of record, even though they have not previously attended school or college in Connecticut, be classified as residents?

A. Yes, provided they meet other criteria.

(10) Would an affidavit stating that the student considers himself or herself a resident of the State of Connecticut be sufficient to establish residency status?

A. The determination must be made on facts—not self-serving declarations. An affidavit would be useful, but there should be supporting data.

With regard to your questions regarding Special Act No. 53 of the 1972 General Assembly, it should be noted that that statute was not mentioned in the tuition litigation before the Federal Court. This legislation thus stands as any other enactment of the legislature, and in interpreting it, ". . . every possible presumption is to be indulged in in favor of the validity of the statute." *Mugler*

v. Kansas, 123 U.S. 623, 661. Accordingly, our answer to your specific question is that in determining residence for the purpose of Special Act No. 53, the criteria set forth in that statute should be used.

Very truly,

Robert K. Killian
Attorney General

By /s/
John G. Hill, Jr.
Assistant Attorney General

JGH:mkv

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

VLANDIS *v.* KLINE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 72–493. Argued March 20, 1973—Decided June 11, 1973

Connecticut requires nonresidents enrolled in the state university system to pay tuition and other fees at higher rates than state residents and provides an irreversible and irrebuttable statutory presumption that because the legal address of a student, if married, was outside the State at the time of application for admission or, if single, was outside the State at some point during the preceding year, he remains a nonresident as long as he is a student in Connecticut. Appellees challenge that presumption, claiming that they have a constitutional right to controvert it by presenting evidence of bona fide residence in the State. The District Court upheld their claim. *Held:* The Due Process Clause does not permit Connecticut to deny an individual the opportunity to present evidence that he is a bona fide resident entitled to in-state rates, on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Pp. 5–13.

346 F. Supp. 526, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined. WHITE, J., filed an opinion concurring in the judgment. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and DOUGLAS, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 72–493

John W. Vlandis, Director of Admissions, the University of Connecticut, Appellant, *v.* Margaret Marsh Kline and Patricia Catapano.	On Appeal from the United States District Court for the District of Connecticut.

[June 11, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.*

Like many other States, Connecticut requires nonresidents of the State who are enrolled in the state university system to pay tuition and other fees at higher rates than residents of the State who are so enrolled. Conn. Gen. Stat. § 10–329 (b), as amended by Public Act No. 5, § 122 (June Session 1971).[1] The constitu-

*MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join the opinion of the Court with the qualification noted in MR. JUSTICE MARSHALL's concurring opinion, *post*, p. —.

[1] Section 122 of that Act provides that "the Board of Trustees of the University of Connecticut shall fix fees for tuition of not less than three hundred fifty dollars for residents of this State and not less than eight hundred fifty dollars for nonresidents . . . ." Pursuant to this statute, the University promulgated regulations fixing the tuition per semester as follows:

	Fall semester 1971–72	Spring semester 1972, and thereafter
In-state student	None	$175.00
Out-of-state student	$150.00	$425.00

In addition, out-of-state students must pay a $200 nonresident fee per semester.

tional validity of that requirement is not at issue in the case before us. What is at issue here is Connecticut's statutory definition of residents and nonresidents for purposes of the above provision.

Section 126 (a)(2) of Public Act No. 5, amending § 10–329 (b), provides that an unmarried student shall be classified as a nonresident, or "out-of-state," student if his "legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut." With respect to married students, § 126 (a)(3) of the Act provides that such a student, if living with his spouse, shall be classified as "out-of-state" if his "legal address at the time of his application for admission to such a unit was outside of Connecticut." These classifications are permanent and irrebuttable for the whole time that the student remains at the university, since § 126 (a)(5) of the Act commands that: "The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit." The present case concerns the constitutional validity of this conclusive and unchangeable presumption of nonresident status from the fact that, at the time of application for admission, the student, if married, was then living outside of Connecticut, or, if single, had lived outside the State at some point during the preceding year.

The appellee, Margaret Marsh Kline, is an undergraduate student at the University of Connecticut. In May of 1971, while attending college in California, she became engaged to Peter Kline, a life-long Connecticut resident. Because the Klines wished to reside in Connecticut after their marriage, Mrs. Kline applied to the University of Connecticut from California. In late May, she was accepted and informed by the Uni-

versity that she would be considered an in-state student. On June 26, 1971, the appellee and Peter Kline were married in California, and soon thereafter took up residence in Storrs, Connecticut, where they have established a permanent home. Mrs. Kline has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. In July 1971, Public Act No. 5 went into effect. Accordingly, the appellant, Director of Admissions at the University of Connecticut, irreversibly classified Mrs. Kline as an out-of-state student, pursuant to § 126 (a)(3) of that Act. As a consequence, she was required to pay $150 tuition and a $200 nonresident fee for the first semester, whereas a student classified as a Connecticut resident paid no tuition; and upon registration for the second semester, she was required to pay $425 tuition plus another $200 nonresident fee, while a student classified as a Connecticut resident paid only $175 tuition.[2]

The other appellee, Patricia Catapano, is an unmarried graduate student at the same University. She applied for admission from Ohio in January 1971, and was accepted in February of that year. In August 1971, she moved her residence from Ohio to Connecticut and registered as a full-time student at the University. Like Mrs. Kline, she has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. Pursuant to § 126 (a)(2) of the 1971 Act, the appellant classified her permanently as an out-of-state student. Consequently, she, too, was required to pay $150 tuition and a $200 nonresident fee for her first semester, and $425 tuition plus a $200 nonresident fee for her second semester.

Appellees then brought suit in the District Court pursuant to the Civil Rights Acts, 42 U. S. C. § 1983, contending that they were bona fide residents of Connecticut,

[2] See n. 1, *supra*.

and that § 126 of Public Act No. 5, under which they were classified as nonresidents for purposes of their tuition and fees, infringed their rights to due process of law and equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution.[3] After the convening of a three-judge District Court, that Court unanimously held §§ 126 (a)(2), (a)(3), and (a)(5) unconstitutional, as violative of the Fourteenth Amendment, and enjoined the appellant from enforcing those sections. 346 F. Supp. 526 (1972). The Court also found that before the commencement of the Spring semester in 1972, each appellee was a bona fide resident of Connecticut; and it accordingly ordered that the appellant refund to each of them the amount of tuition and fees paid in excess of the amount paid by resident students for that semester. On December 4, 1972, we noted probable jurisdiction of this appeal. 409 U. S. 1036.

The appellees do not challenge, nor did the District Court invalidate, the option of the State to classify students as resident and nonresident students, thereby obligating nonresident students to pay higher tuition and fees than do bona fide residents. The State's right to make such a classification is unquestioned here. Rather, the appellees attack Connecticut's irreversible and irrebuttable statutory presumption that because a student's legal address was outside the State at the time of his application for admission or at some point during the preceding year, he remains a nonresident for as long as he is a student there. This conclusive presump-

[3] While the case was pending in the District Court, the Connecticut Legislature passed a bill relating to tuition payments by nonresidents, House Bill No. 5302, which would have repealed the particular portions of the statute that were under constitutional attack. On May 18, 1972, however, the Governor of Connecticut vetoed that bill.

tion, they say, is invalid in that it allows the State to classify as "out-of-state students" those who are, in fact, bona fide residents of the State. The appellees claim that they have a constitutional right to controvert that presumption of nonresidence by presenting evidence that they are bona fide residents of Connecticut. The District Court agreed: "Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-resident than on resident students, the state may not classify as 'out of state students' those who do not belong in that class." 346 F. Supp., at 528. We affirm the judgment of the District Court.

Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments. In *Heiner* v. *Donnan*, 285 U. S. 312 (1932), the Court was faced with a constitutional challenge to a federal statute that created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment by his estate of a higher tax. In holding that this irrefutable assumption was so arbitrary and unreasonable as to deprive the taxpayer of his property without due process of law, the Court stated that it had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Id.*, at 329. See, *e. g.*, *Schlesinger* v. *Wisconsin*, 270 U. S. 230 (1926); *Hoeper* v. *Tax Commission*, 284 U. S. 206 (1931). See also *Tot* v. *United States*, 319 U. S. 463, 468–469 (1943); *Leary* v. *United States*, 395 U. S. 6, 29–53 (1969). Cf. *Turner* v. *United States*, 396 U. S. 398, 418–419 (1970).

The more recent case of *Bell* v. *Burson*, 402 U. S. 535 (1971), involved a Georgia statute which provided that

if an uninsured motorist was involved in an accident and could not post security for the amount of damages claimed, his driver's license must be suspended without any hearing on the question of fault or responsibility. The Court held that since the State purported to be concerned with fault in suspending a driver's license, it could not, consistent with procedural due process, conclusively presume fault from the fact that the uninsured motorist was involved in an accident, and could not, therefore, suspend his driver's license without a hearing on that crucial factor.

Likewise, in *Stanley* v. *Illinois*, 405 U. S. 645 (1972), the Court struck down, as violative of the Due Process Clause, Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. Because of that presumption, the statute required the State, upon the death of the mother, to take custody of all such illegitimate children, without providing any hearing on the father's parental fitness. It may be, the Court said, "that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." 405 U. S., at 654. Hence, the Court held that the State could not conclusively presume that any individual unmarried father was unfit to raise his children; rather, it was required by the Due Process Clause to provide a hearing on that issue. According to the Court, Illinois "insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing . . . ." *Id.*, at 658.[4]

[4] Moreover, in *Carrington* v. *Rash*, 380 U. S. 89 (1965), the Court held that a permanent irrebuttable presumption of nonresidence violated the Equal Protection Clause of the Fourteenth Amendment. That case involved a provision of the Texas Constitution

The same considerations obtain here. It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category. Indeed, in the present case, both appellees possess many of the indicia of Connecticut residency, such as year-round Connecticut homes, Connecticut driver's licenses, car registrations, voter registrations, etc.; and both were found by the District Court to have become bona fide residents of Connecticut before the 1972 Spring semester. Yet, under the State's statutory scheme, neither was permitted any opportunity to demonstrate the bona fides of her Connecticut residency for tuition purposes, and neither will ever have such an opportunity in the future so long as she remains a student.

The State proffers three reasons to justify that permanent irrebuttable presumption. The first is that the State has a valid interest in equalizing the cost of public higher education between Connecticut residents and nonresidents, and that by freezing a student's residential status as of the time he applies, the State ensures

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which prohibited any member of the armed forces who entered the service as a resident of another State and then moved his home to Texas during the course of his military duty, from ever satisfying the residence requirement for voting in Texas elections, so long as he remained a member of the armed forces. The effect of that provision was to create a conclusive presumption that all servicemen who moved to Texas during their military service, even if they became bona fide residents of Texas, nonetheless remained nonresidents for purposes of voting. The Court held that "[b]y forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.*, at 96. See also *Dunn* v. *Blumstein*, 405 U. S. 330, 349–352 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

that its bona fide in-state students will receive their full subsidy. The State's objective of cost equalization between bona fide residents and nonresidents may well be legitimate, but basing the bona fides of residency solely on where a student lived when he applied for admission to the University is a criterion wholly unrelated to that objective. As is evident from the situation of the appellees, a student may be a bona fide resident of Connecticut even though he applied to the University from out of State. Thus, Connecticut's conclusive presumption of nonresidence, instead of ensuring that only its bona fide residents receive their full subsidy, ensures that certain of its bona fide residents, such as the appellees, do *not* receive their full subsidy, and can never do so while they remain students.

Second, the State argues that even if a student who applied to the University from out of State may at some point become a bona fide resident of Connecticut, the State can nonetheless reasonably decide to favor with the lower rates only its established residents, whose past tax contributions to the State have been higher. According to the State, the fact that established residents or their parents have supported the State in the past justifies the conclusion that applicants from out of State—who are presumed not to be such established residents—may be denied the lower rates, even if they have become bona fide residents.

Connecticut's statutory scheme, however, makes no distinction on its face between established residents and new residents. Rather, through § 122, the State purports to distinguish, for tuition purposes, between residents and nonresidents by granting the lower rates to the former and denying them to the latter.[5] In these circumstances, the State cannot now seek to justify its classification of

[5] See n. 1, *supra*.

certain bona fide residents as nonresidents, on the basis that their Connecticut residency is "new."

Moreover, § 126 would not always operate even to effectuate the State's asserted interest. For it is not at all clear that the conclusive presumption required by that section prevents only "new" residents, rather than "established" residents, from obtaining the lower tuition rates. For example, a student whose parents were life-long residents of Connecticut, but who went to college at Harvard, established a legal address there, and applied to the University of Connecticut's graduate school during his senior year, would be permanently classified as an "out-of-state student," despite his family's status as "established" residents of Connecticut. Similarly, the appellee Kline may herself be a "new" resident of Connecticut; but her husband is an established, life-long resident, whose past tax contribution to the State, under the State's theory, should entitle his family to the lower rates. Conversely, the State makes no attempt to ensure that those students to whom it does grant in-state status are "established" residents of Connecticut. Any married person, for instance, who moves to Connecticut before applying to the University would be considered a Connecticut resident, even if he has lived there only one day. Thus, even in terms of the State's own asserted interest in favoring established residents over new residents, the provisions of § 126 are so arbitrary as to constitute a denial of due process of law.[6]

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[6] But even if we accepted the State's argument that its statutory scheme operates to apportion tuition rates on the basis of old and new residency, that justification itself would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment. For in *Shapiro* v. *Thompson*, *supra*, the Court rejected the contention that a challenged classification could be sustained as an attempt to distinguish between old and new residents

The third ground advanced to justify § 126 is that it provides a degree of administrative certainty. The State points to its interest in preventing out-of-state students from coming to Connecticut solely to obtain an education and then claiming Connecticut residence in order to secure the lower tuition and fees. The irrebuttable presumption, the State contends, makes it easier to separate out students who come to the State solely for its educational facilities from true Connecticut residents, by eliminating the need for an individual determination of the bona fides of a person who lived out of State at the time of his application. Such an individual determination, it is said, would not only be an expensive administrative burden, but would also be very difficult to make, since it is hard to evaluate when bona fide residency exists. Without the conclusive presumption, the State argues, it would be almost impossible to prevent out-of-state students from claiming a Connecticut residence merely to obtain the lower rates.

In *Stanley* v. *Illinois, supra,* however, the Court stated that "the Constitution recognizes higher values than speed and efficiency." 405 U. S., at 656. The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is

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on the basis of the contribution they have made to the community through past payment of taxes. That reasoning, the Court stated, "would logically permit the State to bar new residents from schools, parks, and libraries or to deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services." 394 U. S., at 632–633. Cf. *Carrington* v. *Rash, supra,* at 96; *Dunn* v. *Blumstein, supra,* at 354.

premised. In the situation before us, reasonable alternative means for determining bona fide residence are available. Indeed, one such method has already been adopted by Connecticut; after § 126 was invalidated by the District Court, the State established reasonable criteria for evaluating bona fide residence for purposes of tuition and fees at its university system.[7] These criteria, while perhaps more burdensome to apply than an irrebuttable presumption, are certainly sufficient to prevent abuse of the lower, in-state rates by students who come to Connecticut solely to obtain an education.[8]

In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates. Since § 126 precluded the appellees from ever rebutting the presumption that they were nonresidents of Connecticut, that statute operated to deprive them of a significant amount of their money without due process of law.

We are aware, of course, of the special problems involved in determining the bona fide residence of college students who come from out of State to attend that State's public university. Our holding today should in no wise be taken to mean that Connecticut must classify

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[7] See p. 13, *infra*.

[8] Cf. *Carrington* v. *Rash*, *supra*, at 95–96; *Dunn* v. *Blumstein*, *supra*, at 349–352; *Shapiro* v. *Thompson*, *supra*, at 636.

the students in its university system as residents, for purposes of tuition and fees, just because they go to school there. Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status.[9] We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.

We hold only that a permanent irrebuttable presumption of nonresidence—the means adopted by Connecticut

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[9] In *Starns* v. *Malkerson*, 326 F. Supp. 234 (Minn. 1970), the District Court upheld a regulation of the University of Minnesota providing that no student could qualify as a resident for tuition purposes unless he had been a bona fide domiciliary of the State for at least a year immediately prior thereto. This Court affirmed summarily. 401 U. S. 985 (1971). Minnesota's one-year durational residency requirement, however, differed in an important respect from the permanent irrebuttable presumption at issue in the present case. Under the regulation involved in *Starns*, a student who applied to the University from out of State could rebut the presumption of nonresidency, after having lived in the State for one year, by presenting sufficient other evidence to show bona fide domicile within Minnesota. In other words, residence within the State for one year, whether or not in student status, was merely one element which Minnesota required to demonstrate bona fide domicile. By contrast, the Connecticut statute prevents a student who applied to the University from out of State, or within a year of living out of State, from ever rebutting the presumption of nonresidence during the entire time that he remains a student, no matter how long he has been a bona fide resident of the State for other purposes. Under Minnesota's durational residency requirement, a student could qualify for in-state rates by living within the State for a year in student status; whereas under Connecticut's scheme, a person who applied from out of State can never so qualify so long as he remains in student status. See also *Kirk* v. *Board of Regents of Univ. of California*, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), appeal dismissed, 396 U. S. 554 (1970).

to preserve that legitimate interest—is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents. The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates. Indeed, as stated above, such criteria exist; and since § 126 was invalidated, Connecticut, through an official opinion of its Attorney General, has adopted one such reasonable standard for determining the residential status of a student. The Attorney General's opinion states:

> "In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc." [10]

Because we hold that the permanent irrebuttable presumption of nonresidence created by subsections (a)(2), (a)(3), and (a)(5) of Conn. Gen. Stats. § 10–329 (b), as amended by Public Act No. 5, § 126 (1971), violates the Due Process Clause of the Fourteenth Amendment, the judgment of the District Court is affirmed.

It is so ordered.

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[10] Opinion of the Attorney General of the State of Connecticut Regarding Non-Resident Tuition, September 6, 1972 (unreported).

SUPREME COURT OF THE UNITED STATES

No. 72–493

John W. Vlandis, Director of Admissions, the University of Connecticut, Appellant, *v.* Margaret Marsh Kline and Patricia Catapano.	On Appeal from the United States District Court for the District of Connecticut.

[June 11, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring.

I join the opinion of the Court except insofar as it suggests that a State may impose a one-year residency requirement as a prerequisite to qualifying for in-state tuition benefits. See *ante*, at 12 and n. 9. That question is not presented by this case since here we deal with a permanent, irrebuttable presumption of nonresidency based on the fact that a student was a nonresident at the time he applied for admission to the state university system. I recognize that in *Starnes* v. *Malkerson*, 401 U. S. 985 (1971), we summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits. But I now have serious question as to the validity of that summary decision in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide state residents. See *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). Because the Court finds suffiicent basis in the

Due Process Clause of the Fourteenth Amendment to dispose of the constitutionality of the Connecticut statute here at issue, it has no occasion to address the serious equal protection questions raised by this and other tuition residency laws. In the absence of full consideration of those equal protection questions, I would leave the validity of a one-year residence requirement for a future case in which the issue is squarely presented.

In addition, I cannot agree with my Brother REHNQUIST's assertion in dissent that the Court's opinion today represents a return to the doctrine of substantive due process. This case involves only the validity of the conclusive presumption of nonresidency erected by the State, and, as such, concerns nothing more than the procedures by which the State determines whether or not a person is a resident for tuition purposes.

SUPREME COURT OF THE UNITED STATES

No. 72-493

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[June 11, 1973]

MR. JUSTICE WHITE, concurring in the judgment.

In *Starns* v. *Malkerson*, 401 U. S. 985 (1971), a regulation issued by the Board of Regents provided that no student could qualify for the lower, in-state tuition to the University of Minnesota until he had been a bona fide domiciliary of the State for one year. The District Court upheld the law, 326 F. Supp. 234 (Minn. 1970), and we affirmed summarily, although the effect of the Regents' regulation was to prevent an admitted Minnesota domiciliary from being treated as a nondomiciliary for a period of one year. I thought the case warranted plenary treatment, but I did not then, nor do I now, disagree with the judgment. Because I have difficulty distinguishing, on due process grounds, whether deemed procedural or substantive or whether put in terms of conclusive presumptions, between the Minnesota one-year requirement and the Connecticut law that, for tuition purposes, does not permit Connecticut residence to be acquired while attending Connecticut schools, I cannot join the Court's opinion.

I concur in the judgment, however, because Connecticut, although it may legally discriminate between its residents and nonresidents for purposes of tuition, here

invidiously discriminates among at least three classes of bona fide Connecticut residents. First, there are those unmarried students who have resided in Connecticut one year prior to application or who later reside in Connecticut for a year without going to school. They pay the substantially lower in-state tuition. Second, there are the married students who have a legal address in Connecticut at the time of application. They also pay the lower tuition, whether or not they have resided in Connecticut for a year prior to application. Third, there are the unmarried students whose legal address has been outside Connecticut at some time during the year prior to application but who later become legal residents of Connecticut, before or after application or before or after matriculation, and remain such for at least one year. These students, although year-long residents, must continue to pay out-of-state tuition for as long as they are in school.

This discrimination between classes of bona fide residents of the State is sought to be justified, as I understand it, on the sole ground that too few students from out of State actually become Connecticut residents to require the State to sort out this small number by investigating the inevitably larger number of residency claims which would be submitted if the rule were otherwise but which for the most part would be bogus.

In *Bell* v. *Burson*, 402 U. S. 535 (1971), under the applicable state law a driver's license could not be revoked without proof of fault, but, upon the occurrence of an accident, the State automatically suspended the license without showing even probable fault and without an opportunity to prove nonfault. The State neither argued nor claimed that there was a more-likely-than-not inference of fault from the mere event of an accident.

In *Carrington* v. *Rash*, 380 U. S. 89 (1965), the State refused those in active military service the opportunity

to prove residence in the State and thus their eligibility to vote. The Court struck down this restriction. The State's interest in avoiding the task of verifying claims of residency was insufficiently weighty to warrant interference with the right to vote of those military personnel who had actually become domiciled in the State.

In *Stanley* v. *Illinois*, 405 U. S. 645 (1972), the state standard for separating child and parent was unfitness of parent. Accepting the State's argument that most unwed fathers are unfit, we nevertheless required the State to give those fathers a hearing on their fitness prior to depriving them of the custody of their children. It was administratively convenient for the State to presume unfitness and so avoid hearings to identify the perhaps smaller number of fit, unwed fathers; but this justification was found insufficient in view of the strong interest of a natural parent in the custody of his child, an interest that we thought came to this Court " 'with a momentum for respect lacking when appeal is made to liberties which deprive merely from shifting economic arrangements.' " *Id.*, at 651, quoting from *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949) (Frankfurter, J., concurring). The unwed father's interest was at least cognizable and substantial enough to forbid the State, in the name of administrative convenience, from denying the unwed father a hearing on parental fitness prior to declaring his child a ward of the State. The same considerations led us to conclude that the unwed father was denied equal protection of the laws.

From these and other cases, such as *Dandridge* v. *Williams*, 397 U. S. 471 (1971); *Reed* v. *Reed*, 404 U. S. 71 (1971); *Frontiero* v. *Richardson*, — U. S. — (1973), and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), it is clear that we employ not just one, or two, but, as my Brother MARSHALL has so ably demonstrated, a "spectrum of standards in reviewing discrimi-

nations allegedly violative of the Equal Protection Clause." *San Antonio Independent School District* v. *Rodriguez*, No. 71–1332, Slip Opinion, pp. 29–30 (dissenting opinion). Sometimes we just say the claim is "invidious" and let the matter rest there, as MR. JUSTICE STEWART did, for example, in concurring in *Frontiero*. But at other times we sustain the discrimination, if it is justifiable on any conceivable rational basis, or strike it down, unless sustained by some compelling interest of the State, as, for example, when a State imposes a discrimination that burdens or penalizes the exercise of a constitutional right. See, *e. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). I am uncomfortable with the dichotomy, for it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.

Here, it is enough for me that the interest involved is that of obtaining a higher education, that the difference between in- and out-of-state tuition is substantial, and that the State, without sufficient justification, imposes a one year residency requirement on some students but not on others, and also refuses, no matter what the circumstances, to permit the requirement to be satisfied through bona fide residence while in school. It is plain enough that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizarre pattern of discrimination among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State is invidious and violates the Equal Protection Clause.

SUPREME COURT OF THE UNITED STATES

No. 72–493

John W. Vlandis, Director of Admissions, the University of Connecticut, Appellant, *v.* Margaret Marsh Kline and Patricia Catapano.	On Appeal from the United States District Court for the District of Connecticut.

[June 11, 1973]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I find myself unable to join the action taken today because the Court in this case strays from what seem to me sound and established constitutional principles in order to reach what it considers a just result in a particular case; this gives meaning to the ancient warning that "hard cases make bad law." The Court permits this "hard" case to make some very dubious law.

A state university today is an establishment with capital costs of many millions of dollars of investment. Its annual operating costs likewise may run into the millions. Parents and other taxpayers willingly carry this heavy burden because they believe in the values of higher education. It is not narrow provincialism for the State to think that each State should carry its own educational burdens. Until we redefine our system of government—as we are free to do by constitutionally prescribed means—the States may restrict subsidized education to their own residents. This much the Court recognizes and it likewise recognizes that the statutory scheme under review reasonably tends to support that end.

Commendably, the Court has tried to cast the opinion in the narrowest possible terms, but it seems none the

less to accomplish a transferrence of the elusive and arbitrary "compelling state interest" concept into the orbit of the Due Process Clause. The Court categorizes the Connecticut statutory classification as a "permanent and irrebuttable presumption"; it explains that this "presumption" leads to unseemly results in this and other isolated cases; and it relies upon the State's stopgap guidelines for determining bona fide residency to demonstrate that "the State has reasonable alternative means of making the crucial determination." This is the language of strict scrutiny. We ought not try to correct "unseemly results" of state statutes by resorting to constitutional adjudication.

Distressingly, the Court applies "strict scrutiny" and invalidates Connecticut's statutory scheme without explaining why the statute impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny. The real issue here is not whether holes can be picked in the Connecticut scheme; of course that is readily done with this "bad" statute. Whether we deal with statutes of Connecticut or of Congress, we can find flaws, gaps, hard and unseemly results at times. But our function in constitutional adjudication is not to see whether there is some conceivably "less restrictive" alternative to the statutory classifications under review. The Court's task is to explain why the strict scrutiny test, previously confined to other areas, should now in practical effect be read into the Due Process Clause. The drift of *Stanley* v. *Illinois*, 405 U. S. 645 (1972), on which the Court relies heavily, was to apply a similar test, but at least there the Court essayed to explain that the rights of fatherhood and family were regarded as "essential" and "basic civil rights of man," 405 U. S., at 651, and to provide an analytic basis for the result reached. To the same effect was *Bell* v. *Burson*, 402 U. S. 535, where the Court noted that revocation of a

driver's license might impair the pursuit of a livelihood, thereby infringing "important interests of the licensees." 402 U. S., at 539. *Carrington* v. *Rash*, 380 U. S. 89 (1965), an equal protection case, involved deprivation of the right to vote, by the Court's, and MR. JUSTICE STEWART's own description, a substantive constitutional right entitled to special constitutional scrutiny. *San Antonio* v. *Rodriguez*, — U. S. — (1973); *id.*, at — (concurring opinion).*

There will be, I fear, some ground for a belief that the Court now engrafts the "close judicial scrutiny" test onto the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions." But literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as to

*Implicit in my dissenting vote, of course, is my disagreement with MR. JUSTICE WHITE's suggestion that the "weight and value" of the appellees' interest in obtaining a higher education require us to pay something less than the usual deference to the judgment of the Connecticut Legislature. If appellees' chances of securing higher education were truly in jeopardy as a result of the tuition differential at issue here, there would at least be an arguable basis for special concern, though for me the *San Antonio* case would provide a serious obstacle to any departure from the traditional "rational basis" test. In this case, there is in any event no allegation by either appellee that the higher out-of-state tuition charge does, will, or even may deprive her of the opportunity to attend the University of Connecticut. Thus, try as I may, I find it impossible to understand why the interest of appellees at issue here amounts to any more or any less than the number of dollars they are required to pay in excess of Connecticut's in-state tuition rate. That amount may be "substantial," but the Court has never suggested that financial impact, *per se*, requires abandonment of the rational basis test of equal protection review as MR. JUSTICE WHITE suggests. Indeed, I had always thought that a simple financial deprivation was the classic case for judicial deference to legislative choices.

avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred "permanently and irrebuttably" from pursuing his calling, without ever having an opportunity to prove his personal skills. The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area. Can this be what we are headed for?

The pressure of today's holding may well push the States to enact reciprocal statutes to the end that Connecticut will undertake to admit as "resident" students only those students from other States that give the same status to Connecticut residents. When a State allocates a large share of its resources to create and maintain a university whose quality is found attractive to many students from other States, its very success and stature may well operate to cripple it because then, not unnaturally, it will be flooded with applications from students from afar. Perhaps on less "high ground" students who favor winter sports will flock to the Northeast and Northwest and the sun worshipers will head South. Is the Court willing to say that Connecticut may not grant partial scholarships to persons who have attended a Connecticut secondary school for—let us say—at least one full school year and then set nonresident tuition as they do now? We should not be surprised at the natural response of States which, having placed high value on universities, having developed great institutions at large

cost, believe that other States should do the same and therefore seek ways to keep the institution in being for its own citizens. I do not suggest these things ought to be done or that they are desirable; rather, I submit, when we examine a statute of a State we should lay aside preferences for or against what the State does in a few particular or isolated cases and look only to what the Constitution forbids a State to do, so as to avoid putting pressure on the States to engage in legislative devices to escape from the hobbles we place on them on matters of purely state concern.

The urge to cure every disadvantage human beings can experience exerts an inexorable pressure to expand judicial doctrine. But that urge should not move the Court to erect standards that are unrealistic and indeed unexplained for evaluating the constitutionality of state statutes.

SUPREME COURT OF THE UNITED STATES

No. 72–493

John W. Vlandis, Director of Admissions, the University of Connecticut, Appellant, *v.* Margaret Marsh Kline and Patricia Catapano.	On Appeal from the United States District Court for the District of Connecticut.

[June 11, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

The Court's opinion relegates to the limbo of unconstitutionality a Connecticut law that requires higher tuition from those who come from out of State to attend its state universities than from those who come from within the State. The opinion accomplishes this result by a highly theoretical analysis that relies heavily on notions of substantive due process that have been authoritatively repudiated by subsequent decisions of the Court. Believing as I do that the Connecticut statutory scheme is a constitutionally permissible means of dealing with an increasingly acute problem facing state systems of higher education, I dissent.

This country's system of higher education presently faces a serious crisis, produced in part by escalating costs of furnishing educational services and in part by sharply increased demands for those services. Because state systems have available to them state financial resources that are not available to private institutions, they may find it relatively more easy to grapple with the financial aspect of this crisis. But for this very reason, States have generally felt that state resources should be devoted at least in large part to the education of children

of the State's own residents, and that those who came from elsewhere to attend a state university should have to make a more substantial contribution towards the full costs of the education they would receive than the all but nominal tuition required of those who came from within the State.

One way to accomplish such a differentiation would be to make the tuition differential turn on whether or not the student was a "resident" or "non-resident" of the State at the time tuition is paid. The Court, at least by implication, concedes that such a differentiation would violate no command of the Constitution, but even a casual examination of how such a plan would operate indicates why it did not commend itself to the Connecticut Legislature. The very act of enrolling in a Connecticut university with the intention of completing a program of studies leading to a degree necessitates the physical presence of the student in the State of Connecticut. Additional indicia of residency, by which the Court apparently sets great store—obtaining a Connecticut motor vehicle registration or driver's license, registering to vote in Connecticut—impose no significant burden on the out-of-state student in comparison with the thousands of dollars he will save in tuition and fees during the pursuit of a four-year course in undergraduate studies. Thus what the Court concedes to the States in the way of distinguishing between resident and nonresident students, while perhaps a valuable bit of authority in issuing fishing and hunting licenses, is all but useless in making students who come from out of State pay even a portion of their fair share of the cost of the education that they seek to receive in Connecticut state universities.

The system to which Connecticut has turned is one that limits the virtually complete subsidy that is afforded to those who pay in-state tuition to those who resided

in Connecticut at the time of applying for admission, and whose residence in Connecticut did not result from their desire to attend the state universities. Some such plan must be devised by any State that wishes to differentiate between those who have paid taxes to the State over a period of years in order to support the university, and those who have simply come to the State in order to attend the university. Since institutions of higher learning are not built in a year or in a decade, such a distinction strikes me as entirely rational, and I do not understand the Court to hold otherwise.

Understandably, any such general principle will have a number of specific applications, and just as understandably a capable lawyer will be able to focus on one or more of these specific applications that appear to diverge from the principle that the State is attempting to enforce. The Court's opinion deals with the situation of the particular litigants here involved, doubtless chosen with an eye to illustrating the Connecticut system at its worst, and with still other hypothetical examples upon which it expatiates during the course of its opinion. But the fact that a generally valid rule may have rough edges around its perimeter does not make it unconstitutional under the Due Process Clause of the Fourteenth Amendment:

> "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488 (1955).

Throughout the Court's opinion are found references to the "irrebuttable" presumption as to residency created by the Connecticut statutes. But a fair reading of these

laws indicates that Connecticut has not chosen to define eligibility for a state-subsidized education in terms of "residency" at the moment that the applicant seeks admission to the university system, but instead has insisted that the applicant have some prior connection with the State of Connecticut independent of the desire to attend a state-supported university. Thus it would not satisfy Connecticut's goals in seeking to subsidize the education of Connecticut's young people in Connecticut state universities to impose a classical residency test as of the moment of entry into the system of higher education. All students, and not only those with substantial Connecticut connections, will be present in Connecticut on this date, and those who have been astute enough to consult counsel will have obtained Connecticut drivers' licenses, registered their cars in Connecticut, and registered to vote in Connecticut.

Meaningful differentiation between children of families who have supported the state educational system by payment of taxes to the State of Connecticut, and children from families who have not done this, would be impossible if the test were residency as of the date of admission, or the date on which tuition is due, at least as the Court enunciates such a test. But this is not what Connecticut tried to do, and, as I read the Court's opinion, Connecticut is not limited to the imposition of such an easily circumvented test. For the Court reaffirms *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), aff'd, 401 U. S. 985 (1971), in which the State of Minnesota had by regulation provided that no student could qualify as a resident for tuition purposes unless he had been a bona fide domiciliary of the State for at least a year immediately prior thereto. A regulation such as Minnesota's enables the State partially to maintain the distinction that Connecticut has sought to protect here. The Court indicates that the critical dis-

tinction between the Minnesota regulation and the Connecticut statute is that the Minnesota regulation operated to fix nonresidency only for the first year of attendance at the university. But this supposed distinction merely highlights the error in the Court's approach to this entire problem. Minnesota was no more concerned during the first year than is Connecticut with "residency" as that term is used in other legal contexts. One who had his vehicle licensed in Minnesota, obtained a Minnesota driver's license, and registered to vote in Minnesota could make the same attack on the "irrebuttable" presumption of residency involved in *Starns* as these respondents do on the Connecticut statute. The Court's response is that while Minnesota's fixing of residency as of a date prior to application endured for only one year, Connecticut's endures for four years. This is admittedly a factual difference, but one may read the Court's opinion in vain to ascertain why it is a difference of constitutional significance.

The majority's reliance on cases such as *Heiner* v. *Donnan*, 285 U. S. 312 (1932), harks back to a day when the principles of substantive due process had reached their zenith in this Court. Later and sounder cases thoroughly repudiated these principles in large part. Ten years ago, the Court reviewed these doctrines in *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963), and made the following observation:

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous

> opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' "

The Court's highly abstract and theoretical analysis of this practical problem leads to a conclusion that is contrary to the teaching of *Ferguson, supra.*

The typical 18 year old entering college as a freshman, doubtless typifying the largest group of entering students in Connecticut as elsewhere, has in most cases made little or no contribution by way of tax payment to the cost of his public higher education whether it be in Connecticut or elsewhere. More likely it is his parents, themselves long past college age, who have supported the state universities over a period of years with the thought that they would eventually realize some return from this involuntary investment in the form of in-state tuition for their own children who sought to attend a state university. The State of Connecticut has sought to allow this hope to be realized through the distinction that it has made between those who are to pay nominal tuition and those who are to pay the more substantial out-of-state tuition. To the extent that today's decision requires students with no previous connection with the State of Connecticut to be admitted to that State's university system as in-state students, upon obtaining a driver's license and registering to vote, it means that longtime Connecticut residents will not only continue to support the state university system, but that they will be required to support it in increased measure in order to help subsidize the education of nonresidents. The Court's invalidation of the Connecticut plan is quite inconsistent with doctrines of substantive due process that have obtained in this Court for at least a decade, and to which I would continue to adhere.